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[195] (File endorsement omitted.)

[196] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12908

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PETITION FOR REVIEW FILED APRIL 23, 1959

To the Honorable Judges of the United States Court of Appeals for the Third Circuit:

The Petitioner, Consolidated Edison Company of New York, Inc., being aggrieved by an opinion and order* of the Respondent, Federal Power Commission, issued January 30, 1959, in a proceeding entitled "In the Matters of Transcontinental Gas Pipeline Corporation, Docket Nos. G-13143, G-13590 and G-13745, New York State Natural Gas Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipeline Corporation, Docket No. G-13793" (Exhibit A hereto) does hereby petition for review of said order pursuant to Section 19(b) of the Natural Gas Act of 1938, as amended (15 USC 717 r(b)).

Petitioner is a corporation organized and existing under the laws of the State of New York with its principal place

* Originally designated by the Commission as an "order". By errata notice issued March 4, 1959 the order was designated Opinion No. 315-A. References herein to the order issued January 30, 1959 are intended to include Opinion No. 315-A and the ordering clause thereof.

[197] of business at 4 Irving Place, New York 3, New York. Petitioner is engaged in the business of manufacturing and distributing gas, electricity and steam. It supplies natural gas to some 1,318,000 domestic, commercial and industrial customers in its franchise area in the counties of The Bronx, New York, Queens (all part of New York City) and Westchester, all located within the State of New York. Petitioner operates wholly within the boundaries of the State of New York, and is not subject to the jurisdiction of the Respondent, Federal Power Commission. All but a small portion of the natural gas Petitioner distributes to its customers is purchased from Transcontinental Gas Pipeline Corporation ("Transco"), a corporation organized and existing under the laws of the State of Delaware in the Third Circuit. In support of its Petition for Review Petitioner respectfully shows:

The nature of the proceedings as to which review is sought

Review is sought of an order of the Federal Power Commission issued January 30, 1959 (Exhibit A) which denied the application of Transco for a certificate of public convenience and necessity authorizing construction and operation of facilities for rendering a combined gas transportation and peaking service to Petitioner, Consolidated Edison.

By application filed October 28, 1957, as supplemented by filings on December 19, 1957, and January 13th and 27th, 1958, in FPC Docket No. G-13590, Transco requested authorization, pursuant to Section 7 of the Natural Gas Act, to construct and operate pipeline transmission facilities for the purpose of rendering increased natural gas service to its customers. Certain of these facilities were to be used in a combination peaking and transportation

service for Petitioner, which, because of the designation given to the applicable rate schedule, became known as the "X-20 service".

The X-20 service is a unique service designed to meet a unique situation. It represents the best possible solution that could be jointly devised by Petitioner and Transco to alleviate a serious air pollution problem at one of Petitioner's electric generating plants in New York City, and at the same time assure Petitioner of sufficient additional gas to supply the growing needs of its customers adequately and economically during winter and emergency periods of maximum use.

The air pollution problem in the Borough of Manhattan in New York City results from the emission of large quantities of fly ash and sulphur dioxide from the stacks of Petitioner's Waterside Station in midtown Manhattan. The Waterside Plant is unique in two important respects: (1) it provides steam as well as electric service and (2) it is located in one of the most densely populated areas in the world. Unlike most other electric generating stations the Waterside Plant produces a large quantity of steam that is used to heat many of the large buildings in Manhattan. Petitioner's total steam business is roughly equivalent to the whole of Petitioner's gas residential heating service, and the Waterside Station supplies approximately 50% of this steam service. Any gas burned at the Waterside Station, therefore, would be converted to steam, which would be used both to generate electricity and, after distribution through Petitioner's pipeline system, to heat individual buildings. These buildings, if not supplied by Waterside's steam, would have to burn gas or some other fuel under their own boilers.

The location of the Waterside Station is the root of the air pollution problem. It is surrounded by scores of tall buildings including the United Nations buildings and the

[199] Tudor City apartments. Despite the expenditure of $3,600,000 for the most modern dust collecting equipment the stacks of this coal burning station belch forth approximately 27,000 lbs. of fly ash and 42,000 lbs. of sulphur dioxide each day. The effect of these emissions upon the health and comfort of the persons working and living in Manhattan has been, and is, a matter of serious concern to the responsible officials of the City of New York and to the Petitioner. After careful study and the expenditure of large sums of money both the City and Petitioner concluded that the only additional step that would be practicable would be the use of natural gas as fuel.

In order for Petitioner to remedy the problem at Waterside on as nearly permanent and economical a basis as possible, it was necessary for Petitioner to obtain a long-term firm supply of natural gas at a firm price, which did not provide for escalation. A firm supply at a firm price could not be obtained from Transco. Under its tariffs, firm boiler fuel deliveries could not be guaranteed. Moreover, it was probable that there would be further increases in Transco's rates resulting from the steadily increasing cost of gas purchased by Transco.

To obtain a supply of natural gas of the type required Petitioner went directly to the producers of natural gas in Texas and, with Transco's assistance, negotiated contracts for the direct purchase of gas in the field. The producers entered into long term contracts with Petitioner at a fixed price not subject to escalation, but, as a condition of the sale, required that Petitioner should not resell any of the gas so purchased, but should restrict its use to consumption by Petitioner. The sale, since it was not a sale for resale, was therefore not subject to the jurisdiction of the Respondent Commission. There remained only the problem of how Petitioner would move its gas from Texas to New York, and this was resolved by means

of a contract with Transco under which Transco agreed to transport Petitioner's gas at a rate fully compensatory to Transco.

Since the gas purchased by Petitioner in Texas could not be resold, it could not be used by Petitioner to supply its customers during the cold weather when their needs were at their peak. To meet this situation Transco also agreed to supply Petitioner on request for a maximum of 60 days in each year with natural gas from its own reserves in lieu of Petitioner's so-called "transportation gas" from Texas. This valuable service represented the second part of the combined transportation and peaking service Transco proposed to supply under its X-20 rate schedule.

Transco agreed, in order to render this service, to build and operate facilities that would increase the capacity of Transco's lines by 50,000 Mcf (50 million cubic feet) of natural gas per day. Through these facilities Transco would deliver daily to Petitioner in New York 50,000 Mcf of natural gas, which would consist either of Petitioner's gas, transported to New York by Transco, or, during such 60 days, gas sold by Transco to Petitioner from Transco's own reserves.

The proposed X-20 service, as finally presented to the Commission, was designed to benefit Petitioner, its customers, and the general public of New York City, in three important respects:

(1) It would alleviate the air pollution problem at the Waterside Station, a matter of widespread public benefit.

(2) It would supply the economical and reliable source of gas needed to assure adequate service to Petitioner's customers during cold weather or in emergencies, and

[201] (3) The use of gas at Waterside would provide substantial capital and operating savings that would benefit Petitioner's steam and electric customers as well as its gas customers.

The matter was set for hearing by the Commission. Petitioner by timely petitions to the Respondent asked permission to intervene in and be made party to the proceedings; and by order of the Commission, Petitioner and the City of New York were permitted to intervene and participate in all phases of the proceedings in support of Transco's X-20 application. Hearings with respect to certification of the X-20 proposal, along with other elements of Transco's expansion program, were held before a Presiding Examiner March 10, March 11, April 15, 16, 17, 18, 21, 22, 23, 24, 25, and May 2, 1958. At the hearings, evidence in support of the X-20 application was adduced by Transco through its own witnesses, through witnesses called by the Petitioner and through a witness called by the City of New York.

The evidence presented by Transco's witnesses showed with respect to the proposed service that there was an adequate supply of gas to provide the service, the facilities to be employed were adequate, the service was economically feasible, the transportation and other rates to be charged were compensatory, and the construction of the additional capacity would not only have no adverse effect on Transco's existing customers, but would be beneficial to them.

The witnesses called by Petitioner and the City of New York who testified in support of the X-20 application stated that the growth of Petitioner's load made additional supplies of gas for winter peaks and for emergencies an absolute necessity and that the proposed X-20 service would effect substantial capital and operating

savings. These witnesses also testified that the air pollution problem at Petitioner's Waterside plant was a threat to the health and comfort of those working and residing in Manhattan as well as an economic detriment for which the only practicable remedy is the utilization of natural gas.

No evidence was presented by the Commission Staff or by any party or intervenor in opposition to the proposed X-20 service.

The Presiding Examiner, in a decision issued July 9, 1958, determined that a certificate of convenience and necessity authorizing construction and operation of the X-20 facilities should be issued to Transco. He found that there would be no adverse effect by reason of the proposed service upon any of Transco's regulated activities, and held that as a matter of law the Commission had no jurisdiction and no power to consider the use to which Petitioner would put the gas after completion of its transportation.*

On September 4, 1958, after the filing of exceptions to the Presiding Examiner's decision, Respondent Commission issued an order disposing of all of the issues involved in Transco's 1958 expansion program with the exception of the issue relating to the X-20 service, and one other matter not here material. These two matters were deferred for later decision.

On January 30, 1959, the Respondent Commission issued an "Order Denying Certificate of Public Convenience and Necessity and Reversing in Part Initial Decision of Presiding Examiner" (Exhibit A) in which the Commission decided the two matters that had earlier been deferred and denied Transco's application for a certifi-

* The Presiding Examiner did, however, make certain contingent statements, based in part on matters outside the record, which were factually adverse to Petitioner's position.

[203] cate to render the X-20 service. It is this order Petitioner seeks to review herein.

The Commission in its order found that, with one minor exception, the "conventional requirements of public convenience and necessity" as specified in Section 7 of the Act had been met. Against this, however, the Commission weighed and found decisive certain "policy considerations". These considerations were essentially two in number: (1) The Commission objected to the direct non-jurisdictional purchase of natural gas in the field by any distribution company because of the possible effect such purchase might have upon field prices of natural gas, and (2) the Commission did not approve of the use of natural gas as boiler fuel even for the purpose of ameliorating New York City's air pollution problems. Commissioner Hussey dissented on the grounds that all of the usual factors specified in Section 7 of the Natural Gas Act for determining public convenience and necessity had been met, that the Commission had granted certificates for the use of boiler fuel in a number of cases in the past, that the proposed service was far more compensatory than most of those previously authorized and just as justifiable, and that the majority opinion went beyond the record and some of its conclusions were not sustained by the evidence.

On March 2, 1959, Petitioner petitioned for rehearing (Exhibit B hereto) of Respondent's order of January 30, 1959. Petitioner's petition for rehearing was denied by Respondent's order issued March 26, 1959 (Exhibit C hereto).

Jurisdiction and venue

Section 19(b) of the Natural Gas Act of 1938, as amended (15 USC 717 r(b)), provides in part with respect to jurisdiction and venue as follows:

[04] "b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

Petitioner was a party to the proceeding before the Respondent Commission entitled "In the Matters of Transcontinental Gas Pipeline Corporation, Docket Nos. G-13143, G-13590 and G-13745, New York State Natural Gas Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipeline Corporation, Docket No. G-13793," and was aggrieved by the Respondent's order issued January 30, 1959 in the said proceeding, denying the application of Transco for authorization to construct and operate facilities for the purpose of rendering a combined transportation and peaking service to Petitioner.

Petitioner's application for rehearing of the said order was timely filed with Respondent on March 2, 1959, and was denied by Respondent's order issued March 26, 1959.

Transco, the natural gas company to which the Respondent's order of January 30th relates, is a corporation organized and existing under the laws of the State of Delaware in the Third Circuit.

Grounds upon which relief is sought

The Commission's order, issued January 30, 1959, is arbitrary, capricious, not in accordance with law, exceeds

[205] the Commission's jurisdiction and authority under the Natural Gas Act, violates the Administrative Procedure Act and violates Petitioner's rights, privileges and immunities under the Constitution of the United States for the following reasons:

I

The Respondent Commission exceeded its jurisdiction and authority under the Natural Gas Act when it attempted to regulate the non-jurisdictional purchase by Petitioner of natural gas in the field, and the non-jurisdictional use of its own gas by Petitioner in New York City.

The Respondent Commission in its order of January 30, 1959 made it abundantly clear that the certificate requested by Transco was denied, not because of any failure of proof relating to the proposed X-20 service itself or to the specific requirements of the certificate section (§7) of the Natural Gas Act, but solely because the Commission did not approve of a distribution company purchasing its own gas supply in the field, and did not approve of the use to which such gas supply was to be put.

The Petitioner is not a natural gas company. It is not subject to the Commission's jurisdiction. Petitioner's purchase of natural gas in the field in Texas for its own use is not a purchase subject to the Commission's jurisdiction, nor is the consumption by Petitioner of its own gas supply to which it took title in Texas subject to Commission regulation when that gas has been delivered to it in New York City. Yet the Commission has tried, by an illegal extension of its jurisdiction over Transco's transportation of natural gas, to nullify both the non-jurisdictional purchase occurring prior to transportation

and the non-jurisdictional use of Petitioner's natural gas occurring subsequent to transportation. The anomalous result of the Commission's action is that Petitioner is unable to use its own gas to alleviate its air pollution problems in New York City and obtain for itself and its customers all of the other benefits of the X-20 service because Transco is denied the certificate necessary to transport the gas from Texas to New York for Petitioner's account.

It is perfectly apparent from the Commission's order of January 30, 1959 and from its order denying rehearing that the Commission would not issue a certificate to Transco to transport Petitioner's gas no matter what the transportation arrangements were. The merits of the proposed transportation arrangement are mentioned by the Commission in its orders only in passing. The entire thrust of the Commission's orders is directed towards what happens before and after transportation. As far as the Commission is concerned, no matter what rate Petitioner is willing to pay, and no matter how beneficial the transportation arrangement might be for Transco and its other customers, Transco's application would be denied. It was and would be denied solely to prevent Petitioner from purchasing gas in the field and from using it at its Waterside plant.

The Commission's action in this case must be distinguished from that in the usual certificate proceeding, where matters outside the Commission's purview are indirectly and unavoidably affected because a certificate is denied on the ground that the proposed service itself falls short of meeting the test of public convenience and necessity. In that case the service is tested by the normal statutory standards and the adjuncts to the service are indirectly affected. In the instant case it is only the adjuncts (the matters outside the Commission's jurisdiction occurring before and after transportation) that are on

[207] trial, and it is the proposed X-20 transportation and peaking service itself (which is entirely satisfactory) that is an indirect casualty.

The Commission clearly could not prohibit Petitioner from purchasing natural gas in Texas, and it is equally clear that the Commission could not order Petitioner to refrain from using its own natural gas in its Waterside Station. It could not do so because it was the clear intendment of Congress in enacting the Natural Gas Act to exempt such activities from the Commission's jurisdiction. Patently, therefore, it may not indirectly, through unlawful use of its certificate powers, accomplish the same ends that it could not accomplish directly.

II

The Commission erred in failing to issue a certificate of public convenience and necessity to Transco after the requirements of Section 7 of the Natural Gas Act had been met.

The Commission, in its order of January 30, 1959, concedes that "most of the conventional requirements of public convenience and necessity—matters of markets, facilities, gas supply and to a substantial extent, rates—are satisfied".* As noted by Commissioner Hussey in his dissent, there is "an adequate supply of gas for the service, there is a firm demand and market for the gas,

* The Commission notes in its order that a minor portion of the rate structure dealing with the rate of transportation of "displaced" gas, has not, in its opinion, been substantiated on the record. Petitioner believes that the Commission erred in this respect since the rate was substantiated on the record. In any event, however, the transportation of "displaced" gas represents a very insignificant portion of the proposed X-20 service, and if there is actually any defect in proof with respect to the rate for such service it could easily be remedied.

[6] the facilities proposed are adequate, the project is economically feasible, the rate is fully compensatory, the additional services will improve the load factor of Transco's pipeline, and will make available additional volumes of gas for peaking loads".

These requirements of Section 7 of the Natural Gas Act are the only requirements for obtaining a certificate under the Act. Under that section it is mandatory that the Commission issue a certificate if these specific requirements are met. No discretion is permitted the Commission. The mandatory requirements of Section 7(e) of the Act provide that "a certificate *shall be issued* to any qualified applicant therefor • • • if it is found that the applicant is able and willing properly to do the acts, and to perform the service proposed, and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service • • • is or will be required by the present or future convenience and necessity • • •" (emphasis supplied). The standard of public convenience and necessity under Section 7 is definite and certain. The courts have so held and the Commission has repeatedly applied the well-established tests that it cast aside in this proceeding. Having found that the established requirements of public convenience and necessity had been met the Commission erred in failing to issue a certificate in accordance with the mandate of Section 7.

The limitation upon the Commission's certificate authority imposed by Section 7 of the Act may not be avoided by the contention that the Commission has the power to inquire into matters beyond the scope of its jurisdiction. In a certificate proceeding the Commission may inquire into matters outside the scope of its jurisdiction only to the extent that such inquiry is necessary to develop information that is relevant to an application of the stand-

[209] ards of Section 7 of the Act. The Commission, for example, properly considered evidence with respect to the gas reserves available to Petitioner (though such reserves are not subject to Commission jurisdiction) in order to determine whether there was an adequate supply of gas to support Petitioner's long term transportation arrangement with Transco. The Commission may not, however, inquire, as it did, into matters outside its jurisdiction, such as the use to be made of its gas by Petitioner, that have no relevance whatever to the standards prescribed under Section 7 of the Act.

The Commission described the matters outside its jurisdiction, upon which it erroneously based its order, as "policy considerations". The policy expressed, however, existed only in the minds of the Commissioners. Not a scintilla of evidence or even argument in the record relates to such policy matters.* Such "policy considerations" are not in accord with any known policy of Congress. No foundation for their consideration can be found either in the Natural Gas Act or in any other legislation. To the contrary, they contravene the well established policies of Congress relating to air pollution, suppression of competition, undue discrimination, and the express jurisdiction vested in the Commission by the Natural Gas Act.

The Commission's order is expressly aimed at preventing the purchase of gas by Petitioner in competition with pipelines in the field and at prohibiting the use by Petitioner of natural gas to combat air pollution. To permit the Commission's action to stand would constitute undue discrimination against Petitioner in violation of the policy of the Natural Gas Act, an illegal suppression of competition in violation of the anti-trust laws, and a refusal to

* Even the Staff of the Commission refused, until long after the close of the hearings, to give any indication of its views for or against issuance of a certificate, although pressed to do so.

permit implementation of the Congressional policy expressed by statute with respect to air pollution control. The Commission erred in resting its decision upon "policy considerations" which are unrelated to the matters properly subject to Commission's scrutiny under Section 7, and which are contrary to the clearly defined policies of Congress.

III

Even if it be assumed, *arguendo*, that the Commission acted within its jurisdiction the Commission's order should be set aside as arbitrary and capricious, and unsupported by any substantial evidence of record.

The Commission's order of January 30, 1959 flagrantly violates the established rules of administrative procedure, codified in the Administrative Procedure Act, that agency action, findings and conclusions must not be arbitrary, capricious or an abuse of discretion, and must be supported by substantial evidence. The Commission's order must fall because the findings and conclusions therein are not supported by any substantial evidence and because the Commission has failed to find in accordance with the uncontradicted evidence of record.

This is true even if it is assumed*, contrary to the express provisions of the Natural Gas Act, (1) that the Commission does have jurisdiction over a direct purchase in the producing state for consumption by the purchaser,

* It should be noted that the Commission never expressly claimed in the proceedings below that the Commission's jurisdiction embraced the areas covered by these assumptions, but the Commission's order, by reliance on the so-called "policy considerations" has the practical effect of prohibiting Petitioner's purchases in the field and the use by Petitioner of its own gas at Waterside. This action can only be construed as an attempt by the Commission to extend its jurisdiction into these prohibited areas.

[211] (2) that the Commission has the power to regulate an intra-state distribution company, that is not a natural gas company, with respect to the ultimate consumption of its own natural gas, and (3) that the Commission is not limited in a certificate case to application of the standards of Section 7.

A. The Commission erred in failing to find in accordance with the unchallenged facts of record.

All of the evidence of record in the proceeding below relating to the proposed X-20 service was presented in support of that proposal. It comprised oral testimony of qualified witnesses and exhibits demonstrating not only that the transportation service itself met all of the requirements of the Act, but also showing that there would be important health and economic benefits to be derived from the X-20 service. No evidence whatever was introduced to rebut this presentation.

Except for its rather casual finding that most of the conventional requirements for a certificate had been satisfied, the Commission failed and refused to make even a single finding in accordance with the wealth of uncontradicted evidence in the record supporting the granting of a certificate.

The extent of the Commission's error in this regard is magnified if there is acceptance of the Commission's contentions with respect to the scope of its inquiry. The Commission may not claim the right to enlarge the scope of its inquiry, and at the same time refuse to accept the obligation of finding in accordance with the only facts of record relating thereto. If the Commission may consider, with disapproval, the policy of Petitioner's using its gas in its Waterside station (contrary to the provisions of the Natural Gas Act), then it may not ignore the evidence

[212] of record demonstrating the benefits that would result from such use.

The Commission's condemnation of the use of X-20 gas in the Waterside Station as "something less than desirable" and as an "inferior usage" is erroneous in law and fact. The "superior" or "inferior" nature of the use of natural gas depends entirely upon whether the unique characteristics of natural gas as a fuel merit its utilization in the particular circumstances. To label unthinkingly all boiler fuel as inferior *per se*, regardless of whether the particular circumstances require it to be used for the most urgent and meritorious reasons, is arbitrary and capricious. The evidence of record shows that there will be two uses to which the gas supplied through the X-20 service will be put. The first is an extremely valuable and (in the view of the Commission) "superior" use of natural gas, i.e., the use of gas to meet the maximum needs of Petitioner's gas customers. The second use is the burning of natural gas in the Waterside Station. This latter use will alleviate one of New York City's most serious air pollution problems, it will provide substantial capital and operating savings for Petitioner's customers, and it will provide, in addition to electric energy, steam heat for 50% of Petitioner's steam customers. This combination of benefits cannot be obtained through the use of any other fuel or by any other means.

Patently, if the Commission can consider "end use", the Commission erred in failing to find that the use of natural gas at Petitioner's Waterside Station would be a superior use and an additional justification for issuance of a certificate for the proposed X-20 service.

[213] **B. The Commission's findings were not supported by any substantial evidence of record and were arbitrary, capricious and unlawful.**

The Commission rested its order of January 30, 1959 solely upon "policy considerations", and repeated and even stressed its reliance upon these considerations in its order denying rehearing. None of the "policy considerations" are supported by *any* evidence of record, much less substantial evidence. Each of the "policy considerations" represents the sheerest speculation and conjecture. The Commission's policy arguments on which alone it based its denial of Transco's application may be summarized as follows:

> The Commission claims that if Transco's request were to be granted, the Commission would soon be confronted with many similar requests which could not then be denied. The Commission states that it is opposed to the X-20 type of service because it "preempts" pipeline capacity that could be put to more beneficial uses. The Commission also asserts that issuance of the X-20 certificate would result in an increase in the number of bidders in the fields, thereby tending to raise prices, and might adversely affect small purchasers from pipelines.

There is nothing whatever in the record to support these "policy" arguments. There is no evidence that there would be any other similar proposals. There is no support in law or fact for the proposition that a favorable decision in this case would require granting certificates upon different facts in other cases, or that the prospect of such other cases in the future should deprive the applicant of a certificate in this proceeding since each case must stand or fall upon the particular facts and circumstances presented. The X-20 service would not and could not "preempt" capacity for any other purpose since the

X-20 facilities will only be built if certificated and will only have capacity to carry each day the 50,000 Mcf of natural gas bought by Petitioner in Texas. Providing such additional capacity will not reduce or affect in any way Transco's ability to serve its existing or future customers. There was no evidence of record supporting or even claiming such alleged preemption.

The Commission rests its decision *exclusively* upon these policy considerations for which there is no basis in the evidence, nor in sound reason, if policy speculation may be the basis of administrative decision. The Commission's order, therefore, is arbitrary, capricious and unlawful in violation of the Administrative Procedure Act, the Natural Gas Act, and in violation of Petitioner's rights, privileges and immunities under the Constitution of the United States.

Relief Prayed

The Petitioner prays that this Court:

(1) Transmit a copy of this Petition to any member of the Federal Power Commission pursuant to Section 19(b) of the Natural Gas Act (15 USC, Section 717 r(b)).

(2) Require the Commission to file with this Court the record upon which the Commission's order issued January 30, 1959, was entered.

(3) Review the order issued January 30, 1959, and enter a judgment vacating and setting aside said order to the extent it relates to the X-20 service and concluding and adjudging that Transco is entitled to a certificate of public convenience and necessity under Section 7 of the Natural Gas Act authorizing construction and operation

[215] of the X-20 facilities, and remanding the proceedings to the Respondent Commission for further proceedings consistent with the judgment of this Court.

(4) Grant such other and further relief as may be just and proper in the premises.

Respectfully submitted,

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[216] EXHIBIT A TO PETITION FOR REVIEW BEFORE THE FEDERAL POWER COMMISSION

In the Matter of	
TRANSCONTINENTAL GAS PIPE LINE CORPORATION	Docket Nos. G-13143, G-13590
NEW YORK STATE NATURAL GAS CORPORATION	
TEXAS EASTERN TRANSMISSION CORPORATION	Docket No. G-13793
TRANSCONTINENTAL GAS PIPE LINE CORPORATION	

January 30, 1959

HUSSEY, Commissioner, *dissenting:*

I respectfully dissent from the opinion of the majority in this case insofar as it applies to the service by Transco to Consolidated Edison under the proposed rate schedule X-20. I believe that the opinion goes beyond the record in this case and that some of the conclusions are not sustained by the evidence.

All of the factors usually considered in determining public convenience and necessity have been satisfied in this case. There is an adequate supply of gas for the service, there is a firm demand and market for the gas, the facilities proposed are adequate, the project is economically feasible, the rate is fully compensatory, the additional services will improve the load factor of Transco's pipeline, and will make available additional volumes of gas for peaking loads.

[217] The Courts have held on three occasions[1] and the Federal Power Commission has held in at least half a dozen cases[2] that the use of gas for boiler fuel for the generation of electricity to be sold to the public is justified where the public convenience and necessity is otherwise justifiable.

Virtually ever major gas pipeline sells gas for boiler fuel, some for conversion into electricity for public use, and some for purely industrial loads. If we compare the service proposed in this case to sales authorized by the Commission for the same purpose in other cases, it would appear to me that this proposed service is far more compensatory, from the standpoint of the pipeline, than most of the sales in other cases granted by this Commission for the same purpose, and that it is just as justifiable from the standpoint of public convenience and necessity.

Under the proposed arrangement Consolidated Edison would purchase the gas in the field and arrange for Transco to transport the gas for its account. There is an inference in the majority opinion that permitting Consolidated Edison to purchase the gas in the field and make a transportation arrangement would be the introduction of another buyer in the field, which would tend to increase the field price, inferring that Consolidated Edison would be in competition with Transco for the purchase of the gas.

It is my understanding that there is no evidence in this case that there is any market for this gas on the

[1] Department of Conservation *v.* F.P.C. 148 Fed. 2d 746. cert. den., 326 U. S. 717; National Coal Association *v.* F.P.C. 247 Fed. 2d 86; C&WC R.R. Co. 234 Fed. 2d 62.

[2] Transcontinental Gas Pipe Line Co., Inc. *v.* 7 F.P.C. 24; Transcontinental Gas Pipe Line Co. 9 F.P.C. 32; Mississippi River Fuel Corp., Opinion No. 250; Transcontinental Gas Pipe Line Co., Order G-1783; Northern Natural Gas Co. 15 F.P.C. 1634; Scranton Spring Brook Water Co. 17 F.P.C. 25; City Service Gas Company 17 F.P.C. 516.

[218] Transco system except that furnished by Consolidated Edison. If Transco bought the gas in the field it would sell the gas to Consolidated Edison, and regardless of whether the gas is purchased in the field by Consolidated Edison and transported for its account by Transco, or whether the gas is purchased by Transco and resold to Consolidated Edison, there would not be any difference in the market, but it would be the same market, and there would be no competition between Transco and Consolidated Edison for the purchase of the gas, such as would have the effect of raising the field price.

It is also my understanding that there is no evidence in this case that the granting of the X-20 service would in any way deprive any customer of Transco of any needed service. But, in fact, the evidence shows that Transco would have adequate pipeline capacity available for all of the services which it proposes to render, including all services to its other customers for which it now has a market.

John B. Hussey, Commissioner

[219] (File endorsement omitted.)

[220] IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12929

THE CITY OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PETITION FOR REVIEW FILED MAY 22, 1959

To the Honorable Judges of the United States Court of Appeals for the Third Circuit:

The Petitioner, The City of New York, being aggrieved by an order of the Respondent, Federal Power Commission, issued January 30, 1959, in a proceeding entitled "In the Matters of Transcontinental Gas Pipeline Corporation, Docket Nos. G-13143, G-13590 and G-13745, New York State Natural Gas Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipeline Corporation, Docket No. G-13793" does hereby petition for review of said order pursuant to Section 19(b) of the Natural Gas Act of 1938, as amended (15 USC 717 r(b)).

Petitioner is a municipal corporation organized and existing under and by virtue of the laws of the State of New York.

In support of its Petition for Review Petitioner respectfully shows:

[221] **The nature of the proceedings as to which review is sought**

Review is sought of an order of the Federal Power Commission issued January 30, 1959, which denied the application of Transcontinental Gas Pipeline Corporation ("Transco") for a certificate of public convenience and necessity authorizing construction and operation of facilities for rendering a combined gas transportation and peaking service to Consolidated Edison Company of New York, Inc. ("Con Edison").

By application filed October 28, 1957, as supplemented by filings on December 19, 1957, and January 13th and 27th, 1958, in FPC Docket No. G-13590, Transco requested authorization, pursuant to Section 7 of the Natural Gas Act, to construct and operate pipeline transmission facilities for the purpose of rendering increased natural gas service to its customers. Certain of these facilities were to be used in a combination peaking and transportation service for Con Edison, which, because of the designation given to the applicable rate schedule, became known as the "X-20 service".

The use of natural gas was presented as the best possible solution for alleviating a serious air pollution problem created at Con Edison's Waterside plant, located on the East River in midtown Manhattan. It is surrounded by scores of tall buildings including the United Nations. The problem is enormously aggravated by the huge quantity of contaminants which issues from the stacks of this plant, consisting of soot, fly ash and sulphur dioxide.

The Waterside plant not only generates electricity but also produces a great quantity of steam which is used to heat surrounding buildings. If it were not for steam, these buildings would have to furnish their own heat with gas or some other fuel.

[222] The matter was set for hearing by the Commission. Petitioner was permitted to intervene and participate in all phases of the proceedings in support of Transco's X-20 application. Hearings with respect to certification of the X-20 proposal, along with other elements of Transco's expansion program, were held before a Presiding Examiner March 10, March 11, April 15, 16, 17, 18, 21, 22, 23, 24, 25, and May 2, 1958. At the hearings, Petitioner presented an outstanding expert who testified that the air pollution problem at the Waterside plant was a threat to the health and comfort of those working and residing in Manhattan as well as an economic detriment for which the only practicable remedy is the utilization of natural gas. This evidence was not refuted.

The Presiding Examiner, in a decision issued July 9, 1958, determined that a certificate of convenience and necessity authorizing construction and operation of the X-20 facilities should be issued to Transco. He found that there would be no adverse effect by reason of the proposed service upon any of Transco's regulated activities, and held that as a matter of law the Commission had no jurisdiction and no power to consider the use to which Con Edison would put the gas after completion of its transportation.

On January 30, 1959, the Respondent Commission issued an "Order Denying Certificate of Public Convenience and Necessity and reversing in Part Initial Decision of Presiding Examiner" in which the Commission denied Transco's application for a certificate to render the X-20 service. It is this order Petitioner seeks to review herein.

The Commission in its order found that, with one minor exception, the "conventional requirements of public convenience and necessity" as specified in Section 7 of the Act had been met. Against this, however, the Commission weighed and found decisive certain "policy considerations", one of which was that the Commission did not approve of the use of natural gas as boiler fuel even for

[23] the purpose of ameliorating Petitioner's air pollution problems, which the Commission referred to as an "inferior usage". Commissioner Hussey dissented on the grounds that all of the usual factors specified in Section 7 of the Natural Gas Act for determining public convenience and necessity had been met, that the Commission had granted certificates for the use of boiler fuel in a number of cases in the past, and that the majority opinion went beyond the record and some of its conclusions were not sustained by the evidence.

On March 2, 1959, Petitioner petitioned for rehearing of Respondent's order of January 30, 1959. Petitioner's petition for rehearing was denied by Respondent's order issued March 26, 1959.

The facts upon which venue is based

Section 19(b) of the Natural Gas Act of 1938, as amended (15 USC 717 r(b)), provides in part with respect to jurisdiction and venue as follows:

> "b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

Petitioner was a party to the proceeding before the Respondent Commission entitled "In the Matters of Transcontinental Gas Pipeline Corporation, Docket Nos. G-13143, G-13590 and G-13745, New York State Natural

[224] Gas Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipeline Corporation, Docket No. G-13793," and was aggrieved by the Respondent's order issued January 30, 1959 in the said proceeding, denying the application of Transco for authorization to construct and operate facilities for the purpose of rendering a combined transportation and peaking service to Con Edison.

Petitioner's petition for rehearing of the said order was timely filed with Respondent on March 2, 1959, and was denied by Respondent's order issued March 26, 1959.

Transco, the natural gas company to which the Respondent's order of January 30th relates, is a corporation organized and existing under the laws of the State of Delaware in the Third Circuit.

The grounds upon which relief is sought

The Commission's order, issued January 30, 1959, is arbitrary, capricious, not in accordance with law, exceeds the Commission's jurisdiction and authority under the Natural Gas Act and violates the Administrative Procedure Act for the following reasons:

I

The Respondent Commission exceeded its jurisdiction and authority under the Natural Gas Act.

The Respondent Commission in its order of January 30, 1959 made it clear that the certificate requested by Transco was denied, not because of any failure of proof relating to the proposed X-20 service itself or to the specific requirements of the certificate section (§ 7) of the Natural Gas Act, but solely because the Commission did not approve

225] of a distribution company purchasing its own gas supply in the field, and did not approve of the use to which such gas supply was to be put. It is conceded that the Commission has jurisdiction over Transco's transportation of the gas.

It is the position of Petitioner that the Commission exceeded its jurisdiction in attempting to regulate the use of natural gas subsequent to transportation and that such regulation is not within the intendment of the Natural Gas Act. Con Edison, in its Petition for Review, asserts the same error but in addition claims that the Commission also exceeded its jurisdiction in considering its purchase of gas in the field, a position which this Petitioner adopts for the purposes of this proceeding. The requirements of Section 7 of that Act were satisfied and a certificate of convenience and necessity should have issued. The Commission was in error in resorting to "policy considerations" in its denial of the certificate. The effect of the denial is to deprive the people of New York City of an effective means of eliminating a major source of air pollution.

II

The Commission's order should be set aside as arbitrary and capricious, and unsupported by any substantial evidence of record.

Having gone beyond its proper jurisdictional field of convenience and necessity, the Commission erred in invoking "policy considerations", which have no support of any substantial evidence of record. Petitioner is mainly concerned with Respondent's treatment of "end use" and takes issue principally with the Commission's description of the proposed use of the gas as an "inferior usage".

Certainly there is evidence in the record that Con Edison intends to use the gas as boiler fuel and such a finding was

[226] justified. It is the inferential finding that such use is an "inferior usage" of which Petitioner complains as being arbitrary and capricious and unsupported by any substantial evidence. That finding is one of the essential elements of the Commission's determination.

On the contrary, the evidence compels a finding, to the exclusion of all others, that the use of natural gas for the purpose of eliminating a major source of air pollution is in fact a superior use.

Whereas the Commission's order reduces the problem of air pollution to a mere matter of inconvenience, its own finding of "inferior usage" is belied by the uncontroverted proof that the Waterside plant alone discharges 13½ *tons* of fly ash and 21 *tons* of sulphur dioxide per day. It was proved that these emissions can be detrimental to health, particularly in persons subject to asthma and certain lung infections and may cause marked irritation of the respiratory tract.

Also uncontradicted was evidence that the use of natural gas would eliminate this hazard emanating from the Waterside plant. Furthermore, its use would permit the generation of steam for heating large residential and commercial buildings in Manhattan, which otherwise undoubtedly would create separate sources of air pollution in the use of individual boilers.

The relief prayed

The Petitioner prays that this Court:

(1) Transmit a copy of this Petition to any member of the Federal Power Commission pursuant to Section 19(b) of the Natural Gas Act (15 USC, Section 717 r(b)).

(2) Require the Commission to file with this Court the record upon which the Commission's order issued January 30, 1959, was entered.

(3) Review the order issued January 30, 1959, and enter a judgment vacating and setting aside said order to the extent it relates to the X-20 service and concluding and adjudging that Transco is entitled to a certificate of public convenience and necessity under Section 7 of the Natural Gas Act authorizing construction and operation of the X-20 facilities, and remanding the proceedings to the Respondent Commission for further proceedings consistent with the judgment of this Court.

(4) Grant such other and further relief as may be just and proper in the premises.

Respectfully submitted,

CHARLES H. TENNEY,
Corporation Counsel,
Attorney for Petitioner,
Municipal Building,
New York 7, New York.

FRANCIS I. HOWLEY,
Assistant Corporation Counsel.

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[228] (File endorsement omitted.)

[229] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12930

TRANSCONTINENTAL GAS PIPELINE CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PETITION FOR REVIEW FILED MAY 25, 1959

To the Honorable Judges of the United States Court of Appeals for the Third Circuit:

The Petitioner, Transcontinental Gas Pipeline Corporation (Transco) being aggrieved by an opinion and order* of the Respondent, Federal Power Commission, issued January 30, 1959, in a proceeding entitled "In the Matters of Transcontinental Gas Pipeline Corporation, Docket Nos. G-13143, G-13590 and G-13745, the York State Natural Gas Corporation, Texas Eastern Transmission Corporation,

* Originally designated by the Commission as an "order". By errata notice issued March 4, 1959 the order was designated Opinion No. 315-A. References herein to the order issued Januray 30, 1959 are intended to include Opinion No. 315-A and the ordering clause thereof.

230] Transcontinental Gas Pipeline Corporation, Docket No. G-13793" (Exhibit A hereto) does hereby petition for review of said order pursuant to Section 19(b) of the Natural Gas Act of 1938, as amended (15 USC 717r(b)).

Petitioner is a corporation organized and existing under the laws of the State of Delaware and has its principal place of business at 3100 Travis Street, Houston, Texas. Petitioner is engaged in the business of owning and operating a natural gas pipeline system for the transportation and sale of natural gas in interstate commerce. Its pipeline facilities extend from various points in the vicinity of the Gulf of Mexico to New York City. Its principal sales of gas are to gas distribution companies along its route from Alabama to New York, one of its principal customers being Consolidated Edison Company of New York, Inc. (Consolidated Edison). Petitioner is a natural gas company within the meaning of the Natural Gas Act and most of its activities are subject to the jurisdiction of the Federal Power Commission. Its customer, Consolidated Edison Company of New York, Inc., has heretofore filed a Petition For Review in this matter in this Court, and that case is designated as No. 12,908, to which reference will be had herein. In support of its Petition for Review, Petitioner respectfully shows:

The Nature of the Proceedings as to Which Review Is Sought

Petitioner hereby adopts as a part of this Petition, with insignificant modifications, the statement appearing under this heading at pages 2 through 8 contained in the Petition for Review of Consolidated Edison in No. 12,908, substituting for the word "Petitioner" therein the words "Consolidated Edison" and for the word "Transco," the word "Petitioner." As thus changed said statement is as follows:

Review is sought of an order of the Federal Power Commission issued January 30, 1959 (Exhibit A) which

[231] denied the application of Petitioner for a certificate of public convenience and necessity authorizing construction and operation of facilities for rendering a combined gas transportation and peaking service to Consolidated Edison.

By application filed October 28, 1957, as supplemented by filings on December 19, 1957, and January 13th and 27th, 1958, in FPC Docket No. G-13590, Petitioner requested authorization, pursuant to Section 7 of the Natural Gas Act, to construct and operate pipeline transmission facilities for the purpose of rendering increased natural gas service to its customers. Certain of these facilities were to be used in a combination peaking and transportation service for Consolidated Edison, which, because of the designation given to the applicable rate schedule, became known as the "X-20 service".

The X-20 service is a unique service designed to meet a unique situation. It represents the best possible solution that could be jointly devised by Petitioner and Consolidated Edison to alleviate a serious air pollution problem at one of Consolidated Edison's electric generating plants in New York City, and at the same time assure Consolidated Edison of sufficient additional gas to supply the growing needs of its customers adequately and economically during winter and emergency periods of maximum use.

The air pollution problem in the Borough of Manhattan in New York City results from the emission of large quantities of fly ash and sulphur dioxide from the stacks of Consolidated Edison's Waterside Station in midtown Manhattan. The Waterside Plant is unique in two important respects: (1) it provides steam as well as electric service and (2) it is located in one of the most densely populated areas in the world. Unlike most other electric generating stations the Waterside Plant produces a large quantity of steam that is used to heat many of the large buildings in Manhattan. Consolidated Edison's total steam business is roughly equivalent to the whole of its gas resi-

dential heating service, and the Waterside Station supplies approximately 50% of this team service. Any gas burned at the Waterside Station, therefore, would be converted to steam, which would be used both to generate electricity and, after distribution through Consolidated Edison's pipeline system, to heat individual buildings. These buildings, if not supplied by Waterside's steam, would have to burn gas or some other fuel under their own boilers.

The location of the Waterside Station is the root of the air pollution problem. It is surrounded by scores of tall buildings including the United Nations building and the Tudor City apartments. Despite the expenditure of $3,600,000 for the most modern dust collecting equipment the stacks of this coal burning station belch forth approximately 27,000 lbs. of fly ash and 42,000 lbs. of sulphur dioxide each day. The effect of these emissions upon the health and comfort of the persons working and living in Manhattan has been, and is, a matter of serious concern to the responsible officials of the City of New York and to the Petitioner. After careful study and the expenditure of large sums of money both the City and Petitioner concluded that the only additional step that would be practicable would be the use of natural gas as fuel.

In order for Petitioner to remedy the problem at Waterside on as nearly permanent and economical a basis as possible, it was necessary for Consolidated Edison to obtain a long-term firm supply of natural gas at a firm price, which did not provide for escalation. A firm supply at a firm price could not be obtained from Petitioner. Under its tariffs, firm boiler fuel deliveries could not be guaranteed. Moreover, it was probable that there would be further increases in Petitioner's rates resulting from the steadily increasing cost of gas purchased by Petitioner.

To obtain a supply of natural gas of the type required Consolidated Edison went directly to the producers of natural gas in Texas and, with Petitioner's assistance,

[233] negotiated contracts for the direct purchase of gas in the field. The producers entered into long term contracts with Consolidated Edison at a fixed price not subject to escalation, but, as a condition of the sale, required that Consolidated Edison should not resell any of the gas so purchased, but should restrict its use to consumption by Consolidated Edison. The sale, since it was not a sale for resale, was therefore not subject to the jurisdiction of the Respondent Commission. There remained only the problem of how Consolidated Edison would move its gas from Texas to New York, and this was resolved by means of a contract with Petitioner under which Petitioner agreed to transport Consolidated Edison's gas at a rate fully compensatory to Petitioner.

Since the gas purchased by Consolidated Edison in Texas could not be resold, it could not be used by Consolidated Edison to supply its customers during the cold weather when their needs were at their peak. To meet this situation Petitioner also agreed to supply Consolidated Edison on request for a maximum of 60 days in each year with natural gas from its own reserves in lieu of Consolidated Edison's so-called "transportation gas" from Texas. This valuable service represented the second part of the combined transportation and peaking service Petitioner proposed to supply under its X-20 rate schedule.

Petitioner agreed, in order to render this service, to build and operate facilities that would increase the capacity of Petitioner's lines by 50,000 Mcf (50 million cubic feet) of natural gas per day. Through these facilities Petitioner would deliver daily to Consolidated Edison in New York 50,000 Mcf of natural gas, which would consist either of Consolidated Edison's gas, transported to New York by Petitioner, or during such 60 days, gas sold by Petitioner to Consolidated Edison from Petitioner's own reserves.

The proposed X-20 service, as finally presented to the Commission, was designed to benefit Consolidated Edison,

24] its customers, and the general public of New York City, in three important respects:

(1) It would alleviate the air pollution problem at the Waterside Station, a matter of widespread public benefit.

(2) It would supply the economical and reliable source of gas needed to assure adequate service to Consolidated Edison's customers during cold weather or in emergencies, and

(3) The use of gas at Waterside would provide substantial capital and operating savings that would benefit Consolidated Edison's steam and electric customers as well as its gas customers.

The matter was set for hearing by the Commission. Consolidated Edison by timely petitions to the Respondent asked permission to intervene in and be made party to the proceedings; and by order of the Commission, Consolidated Edison and the City of New York were permitted to intervene and participate in all phases of the proceedings in support of Petitioner's X-20 application. Hearings with respect to certification of the X-20 proposal, along with other elements of Petitioner's expansion program, were held before a Presiding Examiner March 10, March 11, April 15, 16, 17, 18, 21, 22, 23, 24, 25, and May 2, 1958. At the hearings evidence in support of the X-20 application was adduced by Petitioner through its own witnesses, through witnesses called by Consolidated Edison and through a witness called by the City of New York.

The evidence presented by Petitioner's witnesses showed with respect to the proposed service that there was an adequate supply of gas to provide the service, the facilities to be employed were adequate, the service was economically feasible, the transportation and other rates to be charged were compensatory, and the construction of the additional capacity would not only have no adverse

[235] effect on Petitioner's existing customers, but would be beneficial to them.

The witnesses called by Consolidated Edison and the City of New York who testified in support of the X-20 application stated that the growth of Consolidated Edison's load made additional supplies of gas for winter peaks and for emergencies an absolute necessity and that the proposed X-20 service would effect substantial capital and operating savings. These witnesses also testified that the air pollution problem at Consolidated Edison's Waterside plant was a threat to the health and comfort of those working and residing in Manhattan as well as an economic detriment for which the only practicable remedy is the utilization of natural gas.

No evidence was presented by the Commission Staff or by any party or intervenor in opposition to the proposed X-20 service.

The Presiding Examiner, in a decision issued July 9, 1958, determined that a certificate of convenience and necessity authorizing construction and operation of the X-20 facilities should be issued to Petitioner. He found that there would be no adverse effect by reason of the proposed service upon any of Petitioner's regulated activities, and held that as a matter of law the Commission had no jurisdiction and no power to consider the use to which Consolidated Edison would put the gas after completion of its transportation.*

On September 4, 1958, after the filing of exceptions to the Presiding Examiner's decision, Respondent Commission issued an order disposing of all of the issues involved in Petitioner's 1958 expansion program with the exception of the issue relating to the X-20 service, and one other

* The Presiding Examiner did, however, make certain contingent statements, based in part on matters outside the record, which were factually adverse to Petitioner's position.

[236] matter not here material. These two matters were deferred for later decision.

On January 30, 1959, the Respondent Commission issued an "Order Denying Certificate of Public Convenience and Necessity and Reversing in Part Initial Decision of Presiding Examiner" (Exhibit A) in which the Commission decided the two matters that had earlier been deferred and denied Petitioner's application for a certificate to render the X-20 service. It is this order Petitioner seeks to review herein.

The Commission in its order found that, with one insignificant exception, the "conventional requirements of public convenience and necessity" as specified in Section 7 of the Act had been met. Against this, however, the Commission weighed and found decisive certain "policy considerations". These considerations were essentially two in number: (1) The Commission objected to the direct non-jurisdictional purchase of natural gas in the field by any distribution company because of the possible effect such purchase might have upon field prices of natural gas, and (2) the Commission did not approve of the use of natural gas as boiler fuel even for the purpose of ameliorating New York City's air pollution problems. Commissioner Hussey dissented on the grounds that all of the usual factors specified in Section 7 of the Natural Gas Act for determining public convenience and necessity had been met, that the Commission had granted certificates for the use of boiler fuel in a number of cases in the past, that the proposed service was far more compensatory than most of those previously authorized and just as justifiable, and that the majority opinion went beyond the record and some of its conclusions were not sustained by the evidence.

On March 2, 1959, Petitioner petitioned for rehearing (Exhibit B hereto) of Respondent's order of January 30, 1959. Petitioner's petition for rehearing was denied by Respondent's order issued March 26, 1959 (Exhibit C hereto).

Section 19(b) of the Natural Gas Act of 1938, as amended (15 USC 717 r(b)), provides in part with respect to jurisdiction and venue as follows:.

> "b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

Petitioner was the Applicant and therefore a party to the proceeding before the Respondent Commission entitled "In the Matters of Transcontinental Gas Pipeline Corporation, Docket Nos. G-13143, G-13590 and G-13745, New York State Natural Gas Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipeline Corporation, Docket No. G-13793," and was aggrieved by the Respondent's order issued January 30, 1959 in the said proceeding, denying the application of Petitioner for authorization to construct and operate facilities for the purpose of rendering a combined transportation and peaking service to Consolidated Edison.

Petitioner's application for rehearing of the said order was timely filed with Respondent on March 2, 1959, and was denied by Respondent's order issued March 26, 1959.

Petitioner, the natural gas company to which the Respondent's order of January 30th relates, is a corporation organized and existing under the laws of the State of Delaware in the Third Circuit.

The Commission's order, issued January 30, 1959, is arbitrary, capricious, discriminatory, not in accordance with law, exceeds the Commission's jurisdiction and authority under the Natural Gas Act, violates the Administrative Procedure Act and violates Petitioner's rights, privileges and immunities under the Constitution of the United States for all the reasons set forth in Petitioner's Application for Rehearing before the Commission, which is attached hereto as Exhibit B (Appendix pp. 17a-84a), which Petition for Rehearing is incorporated herein and made a part hereof. The highlights of these reasons are summarized under the following headings:

I

The Commission Erred in Misinterpreting the Natural Gas Act and in a Manner Wholly in Conflict With the Expressly Declared Policy of Congress

The primary and basic purpose of the proposed transportation by Petitioner for Consolidated Edison was the alleviation of the public nuisance created by the belching of smoke, fly ash and sulphur dioxide from Consolidated Edison's coal-burning Waterside plant in the most densely congested area in New York City. The secondary, but nevertheless highly important purpose of the X-20 arrangement was to provide very valuable and critically necessary peaking gas for Consolidated Edison's resale customers during a period up to sixty days during each winter season.

The record bulks large with extensive testimony in respect to the alarming air pollution caused by the burning of coal in Consolidated Edison's Waterside plant where the proposed transportation gas would be burned. The record also unequivocally demonstrates that the substitution of natural gas for coal in that plant is the only effective means of alleviating or eliminating the air pollution nuisance.

[239] Air pollution in several densely populated cities has been a growing menace for some time and in 1955 sharply arrested the attention of Congress. In that year Congress passed the Air Pollution Control Act (69 Stat. 322; 42 U.S.C. 1857-1857f) and appropriated twenty-five million dollars to carry out the policy of that Act. This policy is clearly indicated in the Act's first section which reads as follows:

CHAPTER 15B.—AIR POLLUTION CONTROL

§ 1857. Declaration of policy

In recognition of the dangers to the public *health* and welfare, injury to agricultural crops and livestock, *damage to and deterioration of property*, and *hazards to air* and ground *transportation, from air pollution*, it is declared to be the *policy of Congress* to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution, to support and aid technical research to devise and develop methods of abating such pollution, and to provide Federal technical services and financial aid to State and local government air pollution control agencies and other public or private agencies and institutions in the formulation and execution of their air pollution abatement research programs. To this end, the Secretary of Health, Education and Welfare and the Surgeon General of the Public Health Service (under the supervision and direction of the Secretary of Health, Education, and Welfare) shall have the authority relating to air pollution control vested in them respectively by this chapter. July 14, 1955, c. 360, §1, 69 Stat. 322. (Italics supplied).

Although this declared policy of Congress was specifically called to the attention of the Commission in the testimony of Dr. Leonard Greenburg, Commissioner of the Department of Air Pollution Control of the City of New York, the Federal Power Commission paid not one whit of heed to it, or even recognized its presence on the statute books in its initial order of January 30, 1959 and makes only backhanded reference to it in its order denying re-

240] hearing (App. p. 93a). As fully demonstrated by the testimony of Dr. Greenberg (App. pp. 60a-78a), it is impossible to conceive of any condition in the United States, with the possible exception of Los Angeles, more acutely demanding the execution of the declared policy of Congress than that found in New York City, particularly in the area of Consolidated Edison's Waterside plant.

This flagrant and arbitrary disregard by the Commission of the clearly defined policy of Congress in the Air Pollution Control Act alone warrants the reversal and remand of its order.

II

The Commission Erred in Failing or Refusing to Make Any Essential Findings in Respect to a Most Crucial Issue in This Case, Namely, the Superior Uses to Which the Transported Gas Was to be Put

Dr. Leonard Greenburg, Chairman of the Air Pollution Control Board of the City of New York and Otto Manz, vice president of Consolidated Edison testified at length and in detail about the dangerous nuisance created by noxious effluvia caused by the burning of coal in Consolidated Edison's Waterside station.

Dr. Greenburg is one of the most eminent authorities in the United States on the subject of air pollution in relation to public health. Because of the extreme importance of his testimony to this case we have printed his testimony in full in the Appendix to this petition (App. pp. 60a-78a). We urgently suggest to this Court a careful reading of that testimony.

A substantial portion of the testimony of witness Manz was supplemental to Dr. Greenburg's testimony and also demonstrated large financial benefit to actual consumers.

No word of testimony was offered for the purpose of refuting either Dr. Greenburg or witness Manz. Never-

[241] theless it is not unfair to state that the Commission gave this crucial testimony just about a complete brush-off. Had the Commission made the findings, or the substance of the findings, which Petitioner urged (App. pp. 24a-34a) it would have been rationally impossible to conclude that the X-20 service was other than for a highly superior, rather than for an "inferior" use.

The failure of the Commission to make appropriate findings based upon the testimony of Doctor Greenburg and witness Manz was utterly arbitrary and illegal.

III

The Commission Erred in Basing Its Decision on So-Called Policy Considerations Which Have No Support Whatsoever in the Record and Are Contrary to the Facts in the Record

As we pointed out above, the Commission determined that Petitioner had, with a possible insignificant exception, met all the conventional standards required for the issuance to it of a certificate of public convenience and necessity for the X-20 service. The Commission then proceeded on the basis of so-called policy considerations to deprive it of its right to the certificate. It stated (Appendix p. 5a):

> "This case involves more than merely the conventional requirements of public convenience and necessity. Opposing the grant of the X-20 service are a number of important factors, chiefly policy considerations. In our judgment, countervailing factors suffice to tip the balance against the grant of the authority requested by Transco."

The Commission then goes on to enumerate these considerations in substance as follows (App. pp. 5a-6a):

1. If the Commission were to grant Transco's request it would soon be confronted with many requests of the same general character and granting the X-20 proposal

242] the Commission would have no fair or rational basis for denying similar requests.

2. The authorization of this and like proposals for such usage would preempt capacity that would otherwise be available to meet more urgent and widely beneficial public needs.

3. The impact of large demand by distribution companies on relatively limited supply is certain enough to raise rates and field prices even if only one bidder is bringing that demand to bear on the supply. How much more serious is that impact when it is in the form of multiple bidders, each attempting to reserve to itself an ample supply. Inevitably, there would be upward pressure on rate levels in the field.

4. Large purchasers of gas, like Consolidated Edison can readily compete with pipelines for gas purchases.

5. The aforesaid policy considerations or elements of public convenience and necessity outweigh the benefits which would likely flow from authorizing the inferior usage of gas under the X-20 proposal.

It is a fundamental proposition of law that the instant case must be decided on the instant record. If any of the other relatively few cities suffering the public nuisance produced by Consolidated Edison's Waterside plant should seek to obtain gas to alleviate that nuisance, then the certificates in those cases should as a matter of public convenience and necessity be granted. Certainly, Transco's application should not be denied on the hypothesis conjectured by the Commission.

In respect to the Commission's notion in respect to pre-emption of pipeline capacity, the record facts are absolutely contrary. In this proceeding Transco, in addition to the proposed X-20 service, has made provision for capacity to serve every last Mcf of gas desired by any

[243] customer or potential customer who participated in the proceeding.

The Commission's notion that it can preclude Consolidated Edison from purchasing gas direct from the producers through an alleged authority to prevent Transco from transporting the same is utterly without foundation as a matter of law. Such action would produce rank discrimination against a distributing company in favor of a pipeline purchaser. Furthermore, the notion that purchases by distributing companies as contrasted with purchases by pipeline companies would have a greater tendency to raise field prices than purchases by competing pipelines, as buyers, is without any rational basis.

The Commission's reference to the X-20 service as an "inferior usage" is, as we have shown above, in commenting on the testimony of Dr. Greenburg and witness Manz, absolutely contrary to the record facts.

None of the policy considerations enumerated above, nor their slight elaboration in the Commission's opinion itself, are possible criteria under the Natural Gas Act for denial of a certificate of public convenience and necessity. It is apparently the Commission's idea that by accumulating five foundationless bases for denial of the certificate they thereby accumulate a "complex" which is adequate. The Commission's denial of the certificate on the enumerated bases is arbitrary and illegal and discriminatory against Petitioners, Consolidated Edison and the City of New York particularly in view of the numerous cases wherein the Commission has certified huge boiler fuel use of gas without any such showing of public benefit as is established in the instant record.

For the reasons set out herein, the Commission's entire order is arbitrary, capricious and unlawful, in violation of the Administrative Procedure Act, the Natural Gas Act, and of Petitioner's rights, privileges and immunities under the Constitution of the United States.

RELIEF PRAYED

The Petitioner prays that this Court:

(1) Transmit a copy of this Petition to any member of the Federal Power Commission pursuant to Section 19(b) of the Natural Gas Act (15 USC, Section 717 r(b)).

(2) Require the Commission to file with this Court the record upon which the Commission's order issued January 30, 1959, was entered.

(3) Review the order issued January 30, 1959, and enter a judgment vacating and setting aside said order to the extent it relates to the X-20 service and concluding and adjudging that Transco is entitled to a certificate of public convenience and necessity under Section 7 of the Natural Gas Act authorizing construction and operation of the X-20 facilities, and remanding the proceedings to the Respondent Commission for further proceedings consistent with the judgment of this Court.

(4) Grant such other and further relief as may be just and proper in the premises.

Respectfully submitted,

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Of Counsel

557770 O-60-4

BEFORE THE
FEDERAL POWER COMMISSION

In the Matters of

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Docket Nos. G-13143, G-13590 and G-13745

Application For Rehearing and Reconsideration

Comes now Transcontinental Gas Pipe Line Corporation (Transco), pursuant to section 19(a) of the Natural Gas Act, as amended, and to paragraph 1.34 of the Commission's Rules of Practice and Procedure, and applies for rehearing and reconsideration of the Commission's order issued herein on January 30, 1959.

SECTION I

Introduction

Transco is applicant in each of the above-entitled dockets. The only one of the above dockets involved here is the application of Transco in Docket No. G-13590 under section 7 of the Natural Gas Act for authorization to provide Consolidated Edison Company of New York (Con Edison) with a transportation and related service under Transco's proposed rate schedule X-20 and to construct and operate the transmission facilities required to render such transportation services.[1]

The Presiding Examiner found that "there is no evidence of any prospective adverse effect by reason of this proposed

[1] By Opinion No. 315 and accompanying order issued herein on September 4, 1958, the Commission authorized Transco to construct and operate the remaining facilities for which authorization is sought in the above-entitled dockets and to render all of the proposed service other than that to Con Edison.

[2] National Coal Association, United Mine Workers of America, and Fuels Research Council, Inc. and Anthracite Institute jointly filed exceptions.

46] transportation service on any of Transco's regulated activities," that the proposed construction, operation and service "are required by the public convenience and necessity" and, subject to Commission review, ordered that a certificate of public convenience and necessity be issued authorizing Transco to provide the Con Edison X-20 service. (Examiner's Decision issued July 9, 1958, mimeo ed. pp. 27, 40, 41). The Staff of the Commission and the coal and coal-carrying railroad intervenors excepted to the Examiner's findings and order, urging the Commission to overrule the Examiner and deny authorization of the Con Edison X-20 service. The City of New York, Con Edison and Transco, while supporting the Examiner's conclusion that a certificate should be issued to Transco, excepted to certain erroneous statements by the Examiner relating to the evidence of record and the jurisdiction of this Commission as well as a "cost of service" rate proposal of the Examiner.

By "Order Denying Certificate of Public Convenience and Necessity and Reversing in Part the Decision of Presiding Examiner," issued herein on January 30, 1959, the Commission denied Transco's application in Docket No. G-13590 insofar as it relates to the proposed Con Edison X-20 transportation and related services.[1]

The Commission committed reversible error in its said order of January 30, 1959, by denying Transco's proposal, as is shown hereinafter. The findings and order should be reconsidered by the Commission, the order of January 30, 1959 rescinded, and an order issued herein granting Transco

[1] The same order denied the request by Lynchburg Gas Company that Transco be authorized under section 7(e) to sell 6,500 Mcf per day of gas to Lynchburg Gas Company's subsidiary, Lynchburg Pipe Line Company. This sale to Lynchburg was not a part of Transco's application herein. Lynchburg sought the additional gas supply as an intervenor in the proceedings and Transco responded on the record that it would undertake such sale should the Commission find it to be in the public interest.

[247] the authorization to provide the Con Edison X-20 service as herein proposed. The errors of the Commission in issuing its said order of January 30, 1959, in the above-entitled manner are set forth under Sections II, III, VI and V hereof.

SECTION II

The Commission in its entire decision committed the overall error of flying into the teeth of the unequivocally expressed will and *"policy considerations"* of Congress contained in Public Law 159 of the 84th Congress (July 14, 1955, 42 U.S.C. §§1857-1857f) and of President Eisenhower's Executive Order No. 10779 issued August 21, 1958, 23 F.R. 6487.

The full text of Public Law 159 is set out at 42 U.S.C. §§1857 through 1857f.[1] Section 1, part of §2 and part of §5 thereof (42 U.S.C. §1857, 1857a(a), 1857d), with bracketed material and emphasis supplied, read as follows:

2457-2466.

"CHAPTER 15B.—AIR POLLUTION CONTROL

§ 1857. Declaration of policy

In recognition of the dangers to the public *health* and welfare, injury to agricultural crops and livestock, *damage to and deterioration of property*, and *hazards to air* and ground *transportation, from air pollution*, it is declared to be the *policy of Congress* to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution, to support and aid technical research to devise and develop methods of abating such pollution, and to provide Federal technical services and financial aid to State and local government air pollution control agencies [Department of Air Pollution Board of the City of New York (R-209)] and other public or private

[1] The legislative history of Public Law 159 is to be found in U.S. Congressional and Administrative News, 1955—Vol. 2, pp.

agencies and institutions in the formulation and execution of their air pollution abatement research programs. To this end, the Secretary of Health, Education, and Welfare and the Surgeon General of the Public Health Service (under the supervision and direction of the Secretary of Health, Education, and Welfare) shall have the authority relating to air pollution control vested in them respectively by this chapter, July 14, 1955, c. 360, § 1, 69 Stat. 322.

Historical Note

Legislative History: For legislative history and purpose of Act July 14, 1955, see 1955 U.S. Code Cong. and Adm. News, p. 2457.

§ 1857a. Research programs; joint investigations; powers of Surgeon General

(a) The Surgeon General is authorized, after careful investigation and in cooperation with other Federal agencies [including the Federal Power Commission†], with State and local government air pollution control agencies, with other public and private agencies and institutions, and with the industries involved [Consolidated Edison Company of New York], to prepare or recommend research programs for devising and developing *methods for eliminating or reducing air pollution*. For the purpose of this subsection the Surgeon General is authorized to make joint investigations with any such agencies or institutions.

• • • • •

§ 1857d. Appropriations; grants-in-aid and contracts

(a) There is authorized to be appropriated to the Department of Health, Education, and Welfare for each of the five fiscal years during the period beginning July 1, 1955, and ending June 30, 1960, not to exceed

[249] $5,000,000 to enable it to carry out its functions under this chapter * * * "

Neither the Secretary of Health, Education and Welfare, nor the Surgeon General could, as a practical matter, be expected to be aware of the pendency of this proceeding before the Federal Power Commission. The Commission was aware of Public Law 159, or definitely should have been, since it was specifically called to its attention on the record in the testimany of Dr. Leonard Greenburg, Commissioner and Chairman of the Department of Air Pollution Control of the City of New York (R. 213):

> "The Congress of the United States recognized the importance of this problem [air pollution], and the 84th Congress, in July, 1955, passed a law authorizing the United States Public Health Service to engage in air pollution control activities, and authorized the service to spend the sum of not exceeding $5 million per year in pursuit of these activities. This is set forth in Public Law 159 of the 84th Congress."

Transco is unaware of any cooperative effort in respect to this instant proceeding by Federal Power Commission personnel with either the Secretary of Health, Education and Welfare or the Surgeon General.[1]

Executive Order No. 10779 issued by President Eisenhower on August 21, 1958 to carry out Public Law 159 (42 U.S.C. § 1857 et seq.) will be found in the 1959 Pocket Part of 42 U.S.C.A., page 13, and reads as follows with bracketed material supplied:

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[1] The main office of the Secretary of Health, Education and Welfare and the Surgeon General is located at 4th Street and Independence Avenue, S.W., Washington, D. C. The phone number is Executive 3-6300.

"CHAPTER 15B.—AIR POLLUTION CONTROL

§ 1857. Declaration of policy

EXECUTIVE ORDER NO. 10779

Aug. 21, 1958, 23 F.R. 6487

COOPERATION OF FEDERAL AGENCIES WITH STATE AND LOCAL AUTHORITIES

The heads of the departments, agencies, and independent establishments of the executive branch of the Government [including the Federal Power Commission†] shall take such action as may be practicable and consistent with law, in cooperation with State and local authorities concerned with the control of air pollution [Department of Air Pollution Board of the City of New York], to insure the prevention or abatement of atmospheric pollution caused by or resulting from Federal activities, including industrial and manufacturing processes operated or controlled by the Federal Government and the destruction of foodstuffs or other materials by order, or under the supervision, of Federal regulatory authorities, in a manner consistent, so far as feasible, with programs authorized under State or local law pertaining to the preservation of the cleanliness of the atmosphere and applicable to the agencies of governmental bodies creating such law and to the public generally.

Dwight D. Eisenhower"

The allegations of error set out under Section IV below portray the curious situation of the Federal Power Commission, having a tailor-made opportunity to accomplish in this proceeding, the end results intended by Public Law 159 and toward which end results Congress has appropriated $25,000,000, clashing head on with the whole intent, purpose and "policy considerations" of Congress and with the end results and policy objectives intended by President Eisenhower's Executive Order No. 10779.

The Commission committed the further overall error of interpreting the Natural Gas Act as if it were entitle "An Act for the Relief of the United States Coal Industry and for the Suppression of Competition therewith by Natural Gas" and in failing to interpret the Natural Gas Act as legislation for the protection of the ultimate *consumers of Natural Gas. F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1943); 64 S. Ct. 281, 291; *Phillips Petroleum Co.* v. *State of Wisconsin* (1954), 347 U.S. 672, 685; 74 S. Ct. 794, 800.

There is a provision in the Natural Gas Act which very definitely indicates that the Gas Act was *not* intended as legislation for the suppression of competition with any competitor or competitive fuel. That provision appears in the proviso of § 5(a) of the Act and reads as follows:

> "*Provided, however,* that the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; * * *"

This is clearly demonstrated by the legislative history of the section. At 83 Cong. Record 9101 (75th Cong. 3rd Sess.), Congressman Lee, the manager in the House of the bill which became the Natural Gas Act, made the following statement:

> "Mr. Lee. It provides that the rates shall not be made higher than the schedule asked for by the company. The purpose of the Senate amendment was to prevent any company's rates being raised over their objection, *with the idea of stifling competition with a competitor.* This means that the rates of the gas company will not be raised higher than their schedules." (Emphasis supplied.)

SECTION IV

Specification of Errors of Omission in Failing to Make Crucially Controlling Facts

While the Commission found that Transco had met the specific or conventional standards set out in the Act, requiring the grant of a certificate of public convenience and necessity (Natural Gas Act, section 7(e)), it was totally oblivious of, or gave no consideration whatsoever to, the heavily preponderant *additional showing* on the record of the unique and "atypical" facts set out in the allegations of error which immediately follow in this Section IV. This dereliction of the Commission is completely contrary to general law, contrary to the Natural Gas Act and acutely contrary to the Administrative Procedure Act, 5 U.S.C. section 1001 et seq., section 10(e);[1] *Universal Camera Co.* v. *National Labor Relations Board*, 340 U.S. 474, 483-489; 71 S. Ct. 456, 462-465.

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[1] "Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion. • • •

"(e) Scope of Review.—So far as necessary to decision and where presented to reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) *arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;* (2) contrary to constitutional right, power, privilege, or immunity; (3) *in excess of statutory jurisdiction, authority,* or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) *unsupported by substantial* evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court *shall review the whole record* or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." 60 Stat. 243-244, 5 U.S.C. § 1009(e), 5 U.S.C.A. § 1009(e), (Emphasis supplied)

[253] (1) The Commission erred in that it totally ignored or disregarded the testimony of the eminently qualified Dr. Leonard Greenburg, Commissioner and Chairman of the Department of Air Pollution Control of the City of New York (R. 209-239), and the basic portions of the testimony of Otto Manz, Executive Vice President of Consolidated Edison (R. 122-150), which testimony establishes beyond controversion the weighty elements of public convenience and necessity, which far surpass the statutory or conventional standards or requirements and conclusively show the unique and "atypical" factors connected with air pollution conditions in the heavily congested and densely populated areas immediately affected by the huge quantities of noxious coal effluvia and *deleterious sulphur dioxide* emanating from the offending boiler station stacks of Con Edison. Dr. Greenburg's testimony, coupled with the Manz testimony, presents a case on all fours with the objectives of Public Law 159, 84th Cong. and Executive Order 10779 covered in Section II above. A copy of the record of Dr. Greenburg's testimony (omitting non-testimonial portions) is appended hereto as Exhibit A, made a part hereof by reference, and the Commission is *most urgently* requested to review the same.

(2) The Commission erred in failing to consider or give any effect whatsoever to the report by the Interstate Sanitary Commission (New York-New Jersey) entitled "Smoke and Air Pollution—New York and New Jersey" in which the following statement is set forth (R. 213-214):

> "Pollution is an irritating nuisance for *millions* of inhabitants of the area and, in addition, brings about numerous more *harmful* effects.
>
> "Economic losses caused by air pollution in the New York-New Jersey metropolitan area are numerous. Pollution results in damage to buildings and structures, painting, finishes, textiles, vehicles, clothing and many other items.

"*Health* may be adversely affected, especially in persons liable to asthma and certain lung impairments. At least a suspicion exists that air pollution may be a contributor to the increase of *lung cancer* and some forms of *heart* disease.

"Aircraft flights into and out of the New York-New Jersey area are hampered by poor visibility brought about by air pollution. Pollution thus increases potential hazards at some of the world's largest airports."[1] (Emphasis supplied.)

(3) The Commission erred in failing to consider and find that Con Edison is essentially the power and *steam* source for New York City, and that its plants provide more than 20,000,000,000 pounds of steam for the use of the citizens of New York each year (R. 215).

(4) The Commission erred in failing to consider and find that the Waterside and East River generating stations of Con Edison produced 13 billion pounds, or 65% (R. 138) of the 20 billion pounds of steam sold by the company in 1957 and each year for the use of the citizens of New York (R. 215); that the Waterside station produced 10 billion (R. 131), or 50% of the total and that these two stations are expected to produce 75% of the steam send-out in 1958 or 75% of the *combined heating need of 2870 buildings* (R. 138).

(5) The Commission erred in failing to consider and in failing to find that the steam distributed from Con Edison's Waterside and East River plants is, in general, used for the same services as the gas the company sells, and the annual send-out of steam *is equivalent to the gas sent out for the total residential heating* (R. 139).

(6) The Commission erred in failing to consider and in failing to find that boilers Nos. 71 and 72, in which the

[1] A vivid example is the crash of an American Airlines plane at LaGuardia Field on February, 1959, in which 65 lives were lost. (Life Magazine, February 16, 1959)

[255] 50,000 Mcf per day of gas proposed in this proceeding is to replace coal are presently contributing 15,000 pounds a day of fly ash and gushing approximately *42,000 pounds of sulphur dioxide* gas into the city's atmosphere, and that this is the *crux* of the problem so far as air pollution is concerned (R. 216).

Attached hereto and marked as Exhibit B is a series of conclusions of eminent experts on the subject of air pollution with particular reference to *the toxic or poisonous effects of the presence of SO_2 or sulphur dioxide* in the atmosphere of areas where people live. To have a feel or understanding of the problem saturating this case, it is imperative that the Commission read Exhibit B.

(7) The Commission erred in failing to consider and in failing to find that there is in New York the densest population in the world (R. 149); that the Waterside Plant of Con Edison, where the transportation gas is to replace coal, is situated in one of the most densely built-up areas of New York City and probably of the world, and that in this area there are located many of New York's finest office buildings, the United Nations Buildings, Grand Central Terminal, many of New York's important hotels and many foreign consulates and legations (R. 216).

(8) The Commission erred in failing to consider and in failing to find that the half-square mile area surrounding the Waterside Plant contains more than sixty-six buildings over eighteen stories high, and that there are many large and small apartment houses located in the immediate vicinity of this power plant (R. 216-217; Exhibit 44).

(9) The Commission erred in failing to consider and in failing to find that the problems of air pollution are *entirely different* where the buildings are low and widely dispersed from the condition *in a city like New York* where the buildings are close together and the effluence from many stacks pollutes the atmosphere (R. 221).

(10) The Commission erred in failing to consider and find that at the East River generating station of Con Edison there are boilers which are not doing an adequate job from the point of view of the Department of Air Pollution Control of the City of New York and that some 42,000 pounds of fly ash are emitted each day to the air by this one station alone and about *360,000 pounds of sulphur dioxide*[1] (R. 222).

(11) The Commission erred in failing to consider and in failing to find that affected by the stack emissions of the East River plant are the buildings of the new Veterans' Hospital, Bellevue Hospital and Nurses Residence; that this Veterans' Hospital is a tremendous edifice, and the Bellevue Hospital complex is probably the largest, or one of the largest, hospital complexes in the United States; that this hospital, Nurses Home, City Mortuary, New York University buildings, and Rehabilitation Center of Dr. Rusk, that all of these buildings together without any question constitute one of the great hospital complexes of *the world*, and that this total group complex is right in the area which is affected by the East River plant (R. 223; Exhibit 44, Exhibit 45).

(12) The Commission erred in failing to consider and in failing to find that for many years the Board of Air Pollution of the City of New York and its predecessor department have received bitter complaints from tenants and office workers in the vicinity of the coal-burning East River and Waterside Plants of Con Edison concerning dust, fly ash, soot and *sulphurous* odors (R. 227).

(13) The Commission erred in failing to consider and in failing to find that the United Nations Building is less than four blocks north of the Waterside Plant and that Mr. Trygve Lie, Secretary-General of the United Nations, characterized the gas and smog nuisance so bad as to create "a serious and potentially *dangerous* condition." (R. 227)

[1] Please refer to Exhibit B attached.

[257] (14) The Commission erred in failing to consider and in failing to find that since 1952 the Department of Air Pollution Control has brought continuous pressure on Consolidated Edison Company in the courts and through official hearings to have the company take steps to reduce the stack emissions at its generating stations (R. 230).

(15) The Commission erred in failing to consider and in failing to find that since January, 1953, Consolidated Edison has spent approximately $38,000,000 of an estimated total cost of $44,000,000 pursuant to a program worked out with the New York City Department of Air Pollution Control but that nevertheless the expenditure of these funds will not produce an adequate reduction of the emissions from boilers 71 and 72 at Con Edison's Waterside Station, nor the emissions from boilers at the East River Plant, embracing not only fly ash, but the *huge tonnages of sulphur dioxide*[1] which are emitted as a result of the combustion processes *in the use of coal.* (R. 230-231)

(16) The Commission erred in failing to consider and in failing to find that boilers 71 and 72 at Waterside continue to emit an excessive amount of soot, smoke, fly ash and *sulphur dioxide,* despite air pollution control equipment and this is due to combustion conditions inherent in these two boilers. (R. 231)

(17) The Commission erred in failing to consider and in failing to find that short of replacing said boilers with entirely new boilers at a cost of approximately $12,000,000, and the expenditure of about four years' time, during which they would have to be taken out of service a good part of the time, there appears to be no practical solution for the control of these boilers other than the conversion of them to the use of natural gas. (R. 231)

(18) The Commission erred in failing to consider and in failing to find that in order to achieve the maximum reduc-

[1] Please refer to Exhibit B attached.

tion of objectionable emissions from the Waterside Plant, reduction in objectionable emissions from this power plant situated in the heart of the *most intensely developed residential and commercial section of Manhattan*, it is necessary to reduce the *consumption of coal* to its practical minimum. (R. 233)

(19) The Commission erred in failing to consider and in failing to find that *there is no other plan* which can be proposed which can give the citizens of this city, New York City, the relief that they need from the nuisance of fly ash and soot-fall and from *exceedingly large amounts of sulphur dioxide*[1] as will a conversion of as many boilers as possible at both Waterside and East River plants to natural gas. (R. 234-235)

(20) The Commission erred in failing to consider the fact that the very air we breathe is perhaps our most precious natural resource; that it is not replaceable; that we live in an envelope of air, and we cannot afford to have our atmosphere become polluted to any great degree; that the ingenuity of man can find and develop many sources of power and many sources of food, but there is *no substitute* for the atmosphere in which we live and work; that air pollution cannot continue to remain an uncontrolled problem; that depletion of this natural resource *must be avoided at all costs.* (R. 235)

(21) The Commission erred in failing to consider and in failing to find that by reason of our country's population increases at the rate of approximately 3,000,000 persons per year, the increase in the consumption of electric power and the increase in industrialization, we must be exceedingly careful or more and more cities of our country will overstep the bounds of reasonable air pollution and when meteorological conditions occur as they have in Los Angeles, the populace is going to be in serious trouble; that when this

[1] Please refer to Exhibit B attached.

[259] happened in the City of London, England, *4,000 people died in a period of about two weeks;* this can happen in other places; and is something which *requires long range planning.* (R. 235-236)

(22) The Commission erred in failing to consider and failing to find that the *health* and comfort of the citizens of New York, including not only those in the immediate vicinity of the East River and Waterside Plants, *but those further away as well,* require the use of gas in these power plants. (R. 237)

(23) The Commission erred in failing to consider that to aid the people of the City of New York, and at the same time carry out the *expressed intent of Congress* in the control of air pollution [Public Law 159, 84th Cong.; 42 U.S.C.], the approval of the use of gas as requested in the instant proceedings is one of the *most significant* ways in which the Federal Power Commission can make a constructive contribution to the *welfare* of the people of New York City. (R. 237)

(24) The Commission erred in failing to consider and in failing to find that the transportation service of 50,000 Mcf per day for 300 days a year coupled with the integrated sale to Con Edison of 50,000 Mcf per day for 60 days a year makes the service *uniquely* adapted to the best interests of the customers in New York City (R. 127) in that the general service gas would provide an important part of the 100,000 Mcf per day to which the winter gas loads are expected to grow in the next three years, would offset the imminent losses of 32 Mmcf per day in Con Edison's existing supply, would obviate the operation of the extremely expensive Hunts Point oil gas plant for which 51 Mcf are needed per day to permit its retirement this year (1959) and provide adequate smoke control in Con Edison's mid-Manhattan generating stations. (R. 128)

(25) The Commission erred in failing to consider and failing to find that the gas supply proposed in this docket

] will reduce capital expenditures by Con Edison for smoke control at Waterside in the amount of $9,650,000. (R. 129; Exhibit 22, Plate 20)

(26) The Commission erred in failing to find that the annual operating expenses of Con Edison at Waterside will be reduced by $1,820,000 by Transcontinental's X-20 service. (R. 129; Exhibit 22, Plate 22)

(27) The Commission erred in failing to consider and failing to find that the 50 Mmcf per day of X-20 service proposed in this docket will provide enough fuel to correct the worst stack emissions at Waterside, though more gas will be required to correct the East River conditions. (R. 133)

(28) The Commission erred in failing to consider and make findings in respect to the importance of retirement of Con Edison's Hunts Point and Astoria gas plants as peak shaving plants. The "out of pocket" operating expenses alone of these plants amount to $7.50 for each Mcf produced as against 34.2c per Mcf under the X-20 service proposed herein. (R. 134-137)

(29) The Commission erred in failing to consider and find that Con Edison has installed at Waterside the most modern equipment to control stack emissions but has been unable to overcome the space limitations because of the location of the Waterside plant. (R. 131)

(30) The Commission erred in failing to consider and find that the installation of gas and oil burning equipment as proposed herein will reinforce the fuel supply to both the electric *and steam system* of Con Edison in the event of an interruption of coal deliveries such as New York has had in the past because of weather and *strikes*. (R. 132; Exhibits 44, 45.)

(31) The Commission erred in failing to consider and in failing to find that the 50 Mcf per day of X-20 service which Transcontinental is asking approval for in this docket

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[261] will provide enough gas at economical price to alleviate the worst conditions at Wateside. (R. 140, 141; Exhibit 22, Plates 9, and 2 to 6)

(32) The Commission erred in failing to find that Transcontinental's proposal herein is a necessary first step in carrying out Con Edison's air pollution program; that the capacity provided by Transcontinental's X-20 service is required to meet the gas load for the year 1959-60 and will reduce emissions at the Wateside station to an acceptable level; and will produce half the capital savings associated with this program ($12,000,000, R. 140) and operating expenses of Wateside station will be reduced $1,820,000 per year. (R. 147)

(33) The Commission erred in failing to consider and find that the use of gas by Con Edison as a fuel for smoke control purposes will not be the cause of a loss of market to the coal companies for the reason that if Transco is not authorized to provide the transportation of gas Con Edison will be under great pressure to convert the East River plant to oil operation as an alternate means of smoke control; and in that event, Con Edison's coal suppliers would lose the market represented by the conversion to gas in these plants and it would therefore be immaterial to the coal interests whether this loss results from the substitution of gas or oil. (R. 148)

(34) The Commission erred in failing to consider and find in respect to the matter of conservation that the convenience of oil which goes with its liquid form gives it an especial value as a fuel for many uses and that from a conservation standpoint there is nothing to be gained from denying the use of gas only to force the use of oil as a result, especially in view of the fact that statistics indicate that the proved reserves of oil in this country are relatively less than those of gas. (R. 149)

(35) The Commission erred in failing to find that the broad public interest is better served by the use of gas in the manner proposed in Con Edison's plant rather than by its retention in the ground for the theoretical exclusive use of domestic gas customers of some period in the future when heat and other forms of energy may well be provided in some better manner. (R. 150)

(36) Vividly demonstrating the blatant error of the Commission in failing to make the aforesaid findings numbers 1 to 35 is the fact that the Commission casually brushed off all of the individual items of record evidence appearing above in the following sentence (Opinion, p. 3):

> "Likewise, the idea of relieving the United Nations headquarters of an unpleasant and annoying smoke nuisance from the particular boilers in which this gas is proposed to be burned is an appealing one."

and in the substantial repetition thereof at Opinion, p. 6:

> "Although as indicated, the idea of ameliorating a smoke condition found unpleasant and annoying by the workers in a unique facility, the United Nations headquarters building, is an attractive one, more weighty considerations compel the denial of the grant."

This brush-off of the most cogent evidence in this record on the subject of public convenience and necessity (beyond the fully satisfied statutory showing) demonstrates nothing short of arbitrariness, capriciousness and unreasonableness. It is a clear violation of the Administrative Procedure Act.

SECTION V

The foregoing Section IV was devoted to the errors of *omission* committed by the Commission in failing to find the vitally essential facts establishing Transco's entitlement to a certificate of public convenience and necessity for the X-20 service which it proposes in this proceeding.

[263] The instant Section V will be devoted to the attack upon the *affirmative* errors committed by the Commission, the findings purportedly made and the factors stated and "policy considerations" indulged in to support a denial of said application and, in this regard, Transco states:

(1) The general and fundamental error which pervades all of the Commission's affirmative findings or "factors" or "policy considerations" is that the instant *record* contains no evidence whatsoever of the factors assumed to exist, or to be envisioned nor any *evidential* basis for the "policy considerations" which purportedly spring from or are distilled out of the non-record facts or factors. This assertion will be demonstrated more particularly in connection with each of the specific allegations of affirmative error of which we hereafter complain.

In this connection it is imperative that there be vividly kept in mind the fundamental proposition that any case, either in a court or before an administrative agency, *must* be decided *upon the record.* The horn-book elements of due process, reasonableness and fair play demand that this be so. The Commission is not permitted under the law to determine valuable and important property rights of the parties before it on the basis of roving speculation as to possible future events, or chimeras, nowhere even intimated, let alone having evidential support, in the record, or even in reasonable imagination outside of the record. The propositions which we assert are deeply embedded in the decided cases, of which a milestone example is *U.S. v. Abilene and Southern Railway Co.* 274 U.S. 281, 286-290. In that case the Interstate Commerce Commission was not even permitted to resort to material in annual reports filed with it by carriers subject to its jurisdiction as is shown by the following brief excerpts from that opinion. (p. 288)

> The mere admission by an administrative tribunal of matter which under the rules of evidence applicable

to judicial proceedings would be deemed incompetent does not invalidate its order. Interstate Commerce v. Baird, 194 U.S. 25, 44; Spiller v. Atchison Topeka and Santa Fe Ry. Co., 253 U.S. 117, 131. *But a finding without evidence is beyond the power of the Commission.* Papers in the Commission's files are not always evidence in a case. New England Divisions Case, 261 U.S. 184, 198, note 19. *Nothing can be treated as evidence which is not introduced as such.* Interstate Commerce Commission v. Louisville and Nashville R.R. Co., 227 U.S. 88, 91, 93; Chicago Junction Case, 264 U.S. 258.

• • • • • • • • • • •

(p. 290)

The general notice that the Commission would rely upon voluminous annual reports is tantamount to giving no notice whatsoever. The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void.

With these fundamentals as a base, we launch upon our specific allegation in respect of the individual facts, "factors" and "policy considerations" upon which the Commission seeks to predicate its denial of the applied-for certificate.

(2) The material contained in the Commission's opinion, reciting the arguments and contentions of the opposing intervenors and the Commission Staff, starting with the first full paragraph on page 2 thereof and continuing through the first paragraph on page 3, and containing the first, second, third and fourth arguments and contentions of the Staff and "certain intervenors" (principally the coal interests) can in no wise be treated as findings of the Commission and, therefore, are legally worthless as support for the ultimate finding of the Commission

[265] denying the certificate to Transco. However, out of an abundance of caution, Transco takes plenary exception to each and every such recital, argument and contention therein for the reasons that the same have no foundation in the record or in fact, are contrary to the evidence and have no validity either in logic or in the law.

(3) The Commission erred in its statement contained in footnote 3 on page 3 reading:

> "The rate for the transportation of the 'displaced' gas has not been substantiated on the record, however."

This finding is positively erroneous. At Transcript Pages 1140 and 1141, Transco's witness O'Connor, in response to questions and cross-examination by counsel for the coal and railroad interests, testified that the rate proposed by Transco of 19.5¢ for displaced gas is at least 8.5¢ per Mcf in excess of properly allocated costs. The testimony reads as follows:

> "Q. (Mr. Jerome McGrath) Now, one further rate was mentioned, and that was in Mr. Bruns testimony, when he referred to a negotiated rate of 19.5 cents per Mcf for make-up gas. Do you recall that?
>
> A. (Mr. James V. O'Connor) Yes, I remember it.
>
> Q. And I questioned Mr. Bruns as to how that was derived, and he stated it was a negotiated rate.
>
> A. That is correct.
>
> Q. Did you have anything to do with the setting of that rate?
>
> A. I did not.
>
> Q. Have you made any study to determine whether that rate covers the cost of rendering the service?
>
> A. If you assume that the service is rendered completely off-peak, the price of 19.5 cents is considerably in excess of allocated costs.
>
> Q. When you say, when you consider it is interruptible, what do you mean by that?
>
> A. Well, the only costs which could be assigned to the make-up gas as an off-peak delivery would be

transmission commodity costs, which according to my allocation, Schedule No. 5——

Q. What exhibit is that?

A. Exhibit 18, Section 4—the transmission commodity costs in connection with the make-up gas to Con Ed is the first figure shown in column 5 of Schedule 5 of Section 4 of Exhibit 18, which is 10.97 cents per Mcf.

Q. And may include all the variable costs such as compressor fuel and the like, is that right?

A. Includes all the variable costs and 50 percent of the fixed costs incurred in transporting the gas from the point of receipt to the point of delivery.

Mr. Jerome Mc Grath: That is all I have, Mr. Examiner."

Thus, the transportation of displaced gas will earn Transco revenues in excess of allocated costs which will inure to the benefit of Transco's sale for resale customers.

The transportation of displaced gas is purely interruptible service which Transco will render when Transco "in its sole judgment has capacity available after fulfilling its other market commitments." (Exhibit 18, Section 1, Page 6, Paragraph 5.01(c)).

Thus, with the correction of this obvious error in respect to a *de minimis* proposition, we find the Commission making a determination that Transco has met all of the "conventional" requirements (§7(e) of the Natural Gas Act) entitling it unquestionably to the certificate of public convenience and necessity as applied for[1] (p. 6):

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[1] Corroborative of this statement is that of Commissioner Hussey in his dissenting opinion at page 1 thereof:

> All of the factors usually considered in determining public convenience and necessity have been satisfied in this case. There is an adequate supply of gas for the service, there is a firm demand and market for the gas, the facilities proposed are adequate, the project is economically feasible, the rate is fully compensatory, the additional services will improve the load factor of Transco's pipeline, and will make available additional volumes of gas for peaking loads.

[267] "Militating in favor of the X-20 service is the fact that most of the conventional requirements of public convenience and necessity—matters of markets, facilities, gas supply, and to a substantial extent, rates—are satisfied."

We will proceed, therefore, with a recital of the affirmative errors made by the Commission in respect to its subsidiary findings and "policy considerations" upon which it predicates its denial of the certificate.

(3) The Commission erred in finding (p. 3):

"Certainly, if we were to grant this request we would soon be confronted with many requests of the same general character; * * *"

There is no evidence whatsoever on the instant record to support this utterly speculative proposition that the granting of Transco's request would soon confront the Commission with many requests of the same general character. In any event in the face of the overwhelming showing of cogent elements of public convenience and necessity, over and beyond the statutory or conventional requirements, which appear in this record,[1] it is sufficient practical and common-sense answer to the above finding to say that if the Commission is, at some future time, presented with a similar record in the case of Los Angeles or Chicago or Cleveland or perhaps some other city having grievous air pollution problems equivalent or substantially comparable to those of New York, the Commission should as a matter of legal duty grant the requisite certificate and not deny it. To do otherwise would be utterly arbitrary, capricious and unreasonable and without authority.

The evidence in this case is bottomed upon *human welfare* and *human health* and not upon cold dollars and cents as was the fact in the recent case of the Houston Coastal project (Docket Nos. G-9262 and G-9960, 16 F.P.C. 118) wherein the Commission granted a certificate, nor the

[1] See Section IV, Allegations of Error numbered 1-36, pp. 8-20.

other recent bald boiler fuel case of the Transco-Vepro project[1] (Docket No. G-12059) wherein the Commission denied a certificate. The difference between the instant Transco-ConEdison proposal and the other two mentioned is, on *the facts, as the dicerence between black and white, or day and night.*

Furthermore, in the *instant* record there are *no* other, let alone *many,* requests of the same general character. In *In the Matter of Tennessee Gas Transmission Company and Niagara Gas Transmission, Ltd.,* Docket No. G-921; *In the Matter of Tennessee Gas Transmission Company,* Docket Nos. G-1922, G. 1969, In Opinion No. 261, August 27, 1953, the Commission delineated correctly the proper legal procedure:

> "We recognize that there is a large unsatisfied market for natural gas in Canada, but we wish to make it plain beyond all per adventure of doubt that in authorizing the exportation to Canada herein sought by Tennessee and Niagara we are not undertaking to supply any market or any area beyond the volumes *for which authorization is granted herein.* If, in the future, application is made for authorization to export additional volumes of natural gas to Canada, whether for use in the areas presently proposed to be served *through Niagara's facilities or through the facilities of other companies in other areas,* we will consider *that* application at *that* time upon *its* merits, and the grant of this authorization under the peculiar circumstances here present obviously cannot be considered as creating a precedent for guidance *in the future in other situations.*" (Emphasis supplied).

(4) The Commission erred in relying upon the following factor or "policy consideration" (p. 3):

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[1] In the Matters of Transcontinental Gas Pipe Line Corporation et al., Dockets Nos. 12059 et al., Order issued December 17, 1958.

[269] "* * * and granting the X-20 proposal we would have no fair or rational basis for denying similar such requests."

The short answer to the quoted statement is that the Commission would in fact have no fair, rational, or legal basis for denying similar such requests, particularly where a showing, such as in the instant case, is made. Furthermore, as stated above, if a distributor in any other large American city is able to make the same showing as was spread upon this record by the City of New York and Consolidated Edison, the Commission should without question or hesitation grant appropriate certificate authorization to ensure a similar supply of gas to that city. We repeat the observation that the instant case is to be decided upon the instant record and not upon any different or conjectural record that may be made in some future suppositious case.

(5) The Commission erred in relying upon the following factor or "policy consideration" (p. 3):

"Likewise, the authorization of this and like proposals would pre-empt for this usage capacity which would otherwise be available to meet more urgent and widely beneficial public needs, * * *"

Again we repeat that the Commission is presently confronted with the proposal made on *this* record and Transcontinental's and Con-Edison's treatment herein should not be determined on suppositious "like proposals" in respect to which there is not a scintilla of evidence in *this* record. Confining attention to the *instant* proposal, there is not the remotest basis for the statement that it would pre-empt capacity which could otherwise be available to meet more "urgent and widely beneficial public needs." The question poses itself, what could be more urgent and widely beneficial needs? The Commission doesn't suggest the answer.

It is to be noted that the 50,000 Mcf capacity for the X-20 service has not been built; therefore there is no problem of "pre-empting" any present capacity in the Transco system.

Furthermore, in the instant case Transcontinental has undertaken to supply, over and above the X-20 service, the last single Mcf of gas requested or desired by any of its existing customers and also of all intervenors who entered the picture after Transcontinental's application was filed herein. No existing or potential new customer has been refused one iota of the service requested.

The lifeblood of Transco is dependent upon the sale of gas. When any new customer, willing and able to pay its proportionate share of the cost of service, requests gas from Transcontinental, adequate facilities will be built as in the past to supply its needs.

The word "pre-empt" carries the connotation that Consolidated Edison's occupation and use of 50,000 Mcf per day of the Transcontinental capacity would preclude the availability of that capacity to some other existing or prospective customer. No such customer has come to the attention of Transco. When he appears, Transco will consider itself benefited to be able to build additional capacity to serve him.

Under these circumstances it is a matter of puzzlement to attempt to fathom what the Commission has in mind when it talkes about this "preemption" notion.

Likewise when the Commission uses the phrase "to meet more urgent and widely beneficial public needs" it is impossible, in the face of the showing made upon this record, to attach any considered meaning to the phrase. Transco has shown through the attached testimony of Dr. Greenburg, through the testimony of Otto Manz and in Section IV of this document that the X-20 gas would be used for most urgent and highly beneficial public needs, to

[271] wit the protection of the *health* and comfort of the citizens of the city of New York and, through the generation of vast quantities of steam which is used for the heating of a large number of buildings in New York through one efficient Consolidated Edison plant as distinguished from less efficient, small individual heating plants in each of said buildings.

(6) The Commission erred in anywise relying upon the implications of the following statement (p. 3):

> "• • • even though the bare authorization here sought would not of itself entirely nullify the Leidy storage project."

The implication of this statement is that the X-20 service would at least to some unspecified extent offset the benefits of the Leidy storage project. Again both the meaning and the rationale of this statement are difficult to fathom.

When the Commission first instructed Transco to investigate the feasibility of storage, it stated (7 F.P.C. 24 at 47 (1948)):

> "Such studies are to be directed toward providing for the elimination of deliveries for interruptible loads of gas which *might* be stored to increase deliveries to meet peak utility requirements."

The Leidy Storage Service meets this standard, but the ConEdison X-20 service is of an entirely different character. The gas made available by the X-20 service is not "gas which might be stored to increase deliveries to meet peak utility requirements" for two reasons: (1) the volume transported is sold by the producers to ConEdison on condition that such gas be consumed by ConEdison and these volumes are ineligible for injection into storage because the storage volumes are used to meet ConEdison's gas resale send-out requirements on winter days, a purpose for which the transportation volumes cannot contrac-

tually be used; and (2) the volumes purchased by Con Edison from Transco during the allowed sixty days of interruption of the X-20 transportation service will be taken by ConEdison on winter days, at the time gas is being withdrawn from storage not injected.

In other words, ConEdison will be obliged to provide its share of the valley gas required for the Leidy storage to it from other sources than the X-20 service. Consequently, the Commission's notion that the X-20 service may impair or nullify the benefits of the Leidy storage project is clearly erroneous. If the X-20 service is not certificated, no one on Transco's system will get it for storage purposes or any other purpose. To indulge in a little speculation of our own, it may well go for straight boiler fuel use in the Texas *intrastate* market judging by the desires of the sellers to refrain from becoming "natural-gas companies."

Furthermore, it is to be kept in mind that the purpose of the X-20 service is to alleviate air pollution in New York City and incidentally to provide huge quantities of heat for ConEdison's steam customers which heat would otherwise be provided by the burning of gas in individual buildings.

(7) The Commission erred in predicating its decision, in any part, upon the following factor or "policy consideration" (p. 4):

> "The impact of large demand on relatively limited supply is certain enough to raise rates and field prices if only one bidder is bringing that demand to bear on the supply. How much more serious is that impact when it is in the form of multiple bidders, each attempting to reserve itself a firm supply. Inevitably, there would be upward pressure on rate levels in the fields. We do not believe we ought to encourage such when it is unnecessary."

[273] Again the rationale of this statement is not reasonable. All of the natural gas pipeline companies in America are active bidders in the various areas which are a source of natural gas. The overwhelming portions of the gas which the pipelines buy from producers are for resale to distributing companies such as ConEdison, which distributing companies buy the gas (a) for resale to domestic and commercial customers, (b) to industrial customers who frequently burn the gas under boilers, and (c) for off-peak use by the distributing companies themselves in their electric departments. Thus the end result is precisely the same whether the purchaser from the producer is the pipeline company or the distributor-utility. The necessary meaning of the above quoted statement of the Commission is that pipelines may vigorously bid against each other for supplies of gas irrespective of the resultant impact on prices of gas in the field, but distributing companies are to be precluded from becoming bidders and this preclusion is to be effectuated by the Federal Power Commission under the guise of regulating "transportation."

In the instant case what earthly or heavenly difference would the pressure on field prices be if Transco bought the 50,000 Mcf itself and resold the same to ConEdison. If there could be a difference the writer is unable to guess it. Certainly the Commission, in its decision, gives no hint of the answer to the riddle.

The connotations of the action of the Commission in denying to ConEdison the right to make field purchases and denying Transco permission to transport distributor-purchased gas are striking. There is certainly no intimation anywhere in the legislative history of the Natural Gas Act or in the Act itself indicating that the Commission has authority under its power to regulate transportation to accomplish the results brought about by its decision in this case.

If two pipeline companies concerted in any fashion to block a distributing company—or as a matter of fact any other person—from purchasing natural gas from producers in the field, it is a certainty that the Anti-trust Division of the Department of Justice would be at their throats before one could say "Jack Robinson." It is difficult to imagine a more effectual and illegal suppression of competition in the purchase of gas than the position being taken by the Commission. It is of at least atmospheric interest in this connection to note that Section 20(a) of the Gas Act contains the following provision:

> "The Commission may transmit such evidence as may be available concerning * * * apparent violations of the Antitrust laws to the Attorney General who in his discretion may institute the necessary criminal proceedings."

Furthermore, the Commission has repeatedly authorized other distributing companies, through their subsidiaries, to purchase large quantities of gas in the field. Peoples Natural Gas Company of Chicago through its pipeline subsidiaries is a bidder for and purchases the entire requirements of the City of Chicago from the natural gas fields. Also the Columbia Gas System through its subsidiary Gulf Interstate is a heavy bidder for and purchaser of gas in the natural gas fields.

The same is true of Michigan-Wisconsin Pipe Line Company or the American Louisiana system. In the Michigan-Wisconsin case, 6 F.P.C. 1 at page 34 the Commission observed:

> "Distinguishing between Michigan Consolidated's own interest and the ultimate consumer's interest, there is nothing unusual or objectionable in the distributing company's effort to assure itself, in the best manner possible of a long-term natural gas supply at a low cost and under favorable conditions."

[275] Why are ConEdison and Transco denied the same privilege? Discrimination against ConEdison and Transco or "undue prejudice" against New York? Should the Commission through certification of a Houston-Coastal project (16 F.P.C. 118) keep the benefits of wholesome air for Florida and perpetuate the fumigation, *with sulphur dioxide* (SO_2), of the people of New York? Section 4(b) of the Act *prohibits* discrimination in any respect "as between localities."

Having in mind these cases and more particularly the Houston-Coastal case, what the Commission's action herein boils down to is (a) the denial of the equal protection of the law and (b) the effectuation of a cold discrimination against Transco and ConEdison which is prohibited by the Natural Gas Act. Section 4 of the Natural Gas Act reads in pertinent part as follows:

> "No natural gas company shall, with respect to *any transportation* or sale of natural gas subject to the jurisdiction of the Commission (1) to make or grant any undue preference or advantage to any person or subject any person *to any undue prejudice or disadvantage* or (2) maintain any unreasonable difference in rates, charges, *service, facilities, or in any other respect,* either *as between localities* or as between classes of service."

Certainly the Commission itself has no authority to effect a violation of the statute which is so specifically interdicted as to a natural gas company.

(8) The Commission erred in predicating its decision in any part upon the following factors or "policy considerations" (p. 4):

> "Large purchasers of gas, like Consolidated Edison, can readily compete with pipelines for gas purchases. Here, for example, out of approximately 100 million Mcf that is proposed *ultimately* to be brought through

Transcontinental's lines for Consolidated Edison's use in 1961, almost 44 million Mcf would be under a *purchase-contract carriage arrangement.* That is the equivalent to a pipeline of about 120,000 Mcf per day capacity at 100% load factor. But the smaller purchaser may not be as fortunate. He will have to rely on the pipeline supplier. And how long the pipeline can continue to buy in competition with *non-jurisdictional,* large volume purchasers, or indeed, how willing it might be to undertake such less desirable service, is at least a question." (Emphasis supplied)

In order to expose the errors of this statement, it is necessary to break it down into its components. We will discuss first the following:

"Large purchasers of gas, like Consolidated Edison, can readily compete with pipelines for gas purchases."

Under assignment of error (No. 7 above, pp. 32 to 35), we discussed the lack of statutory authority in the Commission to use its limited powers over "transportation" to prevent distribution companies from purchasing natural gas in the fields from producers. We also exposed the spacious proposition that there is any difference in effect between a distribution company purchasing its own gas from producers and having the same transported by a pipeline on one hand, and having the pipeline purchase the same quantity of gas from a producer, transport it to the city gate and there resell it to the distribution company. This lack of difference, in ultimate effect, is made the more obvious when it is considered that the pipeline company is allowed in its cost of service for the gas itself precisely the same amount, to the fourth or fifth decimal point, which it pays to the producer in the field.

We will proceed to the next segment of the above full quoted statement of the Commis ion reading as follows:

"Here, for example, out of approximately 100 million Mcf that is proposed *ultimately* to be brought through

[277] Transcontinental's lines for Consolidated Edison's use in 1961, almost 44 million Mcf would be under a *purchase-contract carriage arrangement.* That is the equivalent to a pipeline of about 120,000 Mcf per day capacity at 100% load factor." (Emphasis supplied)

In the first place, the Commission is called upon to decide only upon the 50,000 Mcf per day for the Consolidated Edison Waterside Plant and, as we have repeatedly said above, the Commission must decide *this* case on *this* record. When and if Transcontinental, at some time in the future, files an application for transportation to Consolidated Edison of another 70,000 Mcf, the Commission, on parity of reasoning, must decide *that* case on *that* record. Until that application is filed and a decision is made upon that record, it is again speculative to talk about the annual quantity of 100 million Mcf that *might be* transported for Con Edison in 1961, or to talk about the equivalence to a pipeline of about 120,000 Mcf per day capacity at 100% load factor.

The quoted statement goes on to say:

"But the smaller purchaser may not be as fortunate. He will have to rely on the pipeline supplier."

As to just why the smaller purchaser may not be so fortunate because he will have to rely upon the pipeline supplier is not easy to guess. The Commission in its decision has given no hint as to why this would be so. Certainly, Transcontinental does not believe it to be so and is confident that the contrary is the true situation. There are several small purchasers on Transcontinental's system and every one of them is receiving every Mcf of gas it desires and at rates fixed by the Federal Power Commission. This is precisely what Congress intended, namely *adequate service* at *reasonable rates.* These two objectives represent the fundamental purpose of Congress in passing the Natural Gas Act. No doubt, if the Commission is able to point out to Congress that the distributor should be precluded from purchasing gas from producers in the field because of some

unspecified adverse effect on the smaller purchaser, Congress would undoubtedly provide the Commission with adequate powers to remedy the situation. Up to this point, we find no such authority in the Natural Gas Act.

The balance of the quoted material is in the form of the following question:

> "And how long the pipeline can continue to buy in competition with *non-jurisdictional*, large volume purchasers, or indeed, how willing it might be to undertake such less desirable service, is at least a question."

Again, we are confronted with plain, unadulterated speculation. There is certainly not a scintilla of evidence or hint of this Commission-posed question on the record of this case. It is doubtful whether any record at any time could be made to support the conclusion implicit in the Commission's question.

(9) The Commission erred in relying upon the following statement "or policy considerations" involved therein (p. 4):

> "These are all factors that weigh against the grant. They would confound and make more difficult a decision in such a case as this *even if the gas were to be used for a demonstrably superior use.* But when the purpose for which the sale would be made is something less than desirable, they take on more serious, even *controlling*, significance."

Above, we have discussed and disposed of the "factors that weigh against the grant." We have also shown that the use of the gas is unquestionably for a demonstrably, and fully demonstrated superior use; that is the comfort, and more importantly, the health of a vast number of citizens of New York City. When the Commission speaks of its "factors" making more difficult a decision in such a case as this, again we say that we have analyzed each of these factors and exposed their tenuousness and insubstantiality,

[279] both as a mater of law and as a matter of factual, as opposed to purely speculative reality. When the Commission says that the purpose for which the sale would be made "would be something less than desirable" they have demonstrated unquestionably either (a) an utter unawareness of the record facts or (b) a complete unconcern for the serious problems of public *health* involved and of the objectives sought to be accomplished by Public Law 159 of the 84th Congress. To the factors upon which the Commission relies for its decision, which we have discussed in detail up to this point, the Commission attributes "controlling" importance. When we counterpose the Commission's invalid "factors" against the valid public interest factors vividly portrayed in the testimony of Dr. Greenburg and the cognate portions of the testimony of Otto Manz, we strike a balance overwhelmingly in favor of the proposition that public convenience and necessity demands the grant of the TRANSCO certificate as applied for.

(10) The Commission erred in relying upon the following factor or "policy consideration" in denying its certificate to Transco (p. 5):

> "It is true that we have in exceptional instances authorized the transportation by pipeline companies of natural gas purchased by power companies as boiler fuel. See, *e.g.*, Commission Opinion No. 301 issued December 28, 1956, in the *Houston, Texas Gas and Oil Corporation* case 16 F.P.C. 118.[6] In such cases, however, there were present offsetting benefits to the public which outweighed the detriments of the service—for example, the making possible of a new fuel supply to a region lacking in native fuel resources as in the *Houston, Texas* case, *or some other substantial benefit.* However, in this case there are no such substantial benefits to the consuming public to outweigh the detriments cited above. On such a record, we must deny the permission requested."

Again to expose the errors of the Commission in the quoted statement, it becomes necessary to break the statement into its component parts. Let us start first with different portions of the statement.

> "It is true that we have in exceptional instances authorized the transportation by pipeline companies of natural gas purchased by power companies as boiler fuel. See, *e.g.*, Commission Opinion No. 301 issued December 28, 1956, in the *Houston, Texas Gas and Oil Corporation* case, 16 F.P.C. 118.[1] In such cases, however, there were present offsetting benefits to the public which outweighed the detriments of the service—for example, the making possible of a new fuel supply to a region lacking in native fuel resources as in the *Houston, Texas* case, or some other substantial benefit."

Let us observe at the outset that New York City is utterly "lacking in native fuel resources."

Not only in the Houston Coastal case has the Commission authorized the transportation of gas for boiler fuel purposes. They have done so in many other cases,[1] not necessarily as a separate transportation arrangement but whether there is a straight transportation arrangement or a transportation resale arrangement, the end result is precisely the same—straight boiler fuel use without any of the benefits to comfort and health which are spread upon the instant record. One example is Transcontinental's own sale to the Duke Power Company (11 F.P.C. 605), where, it is true, very substantial *financial* benefits to Transcontinental's distribution-company customers was shown. Another example is the Commission's certification of the Black Dog project (15 F.P.C. 1634, reversing 15 F.P.C. 673) again because of financial benefits to Northern's resale customers (15 F.P.C. 1634, 1636). However, in neither of these cases was there shown the great benefits to the *health* and com-

[1] See footnote 2 on page 1 of Commissioner Hussey's dissenting opinion in this proceeding.

[281] fort of the human being who had their residences and necessary places of business immediately adjacent to the plants where the gas involved was consumed. In the Houston, Texas case the situation, boiled down to its essence, was the same. The colossal use of boiler fuel in that case was the essence of the dollars and cents or financial feasibility of the project. No showing one way or the other of the impact on human comfort and human *health* was even intimated on the record in that case. The Commission justifies the Houston, Texas project on the ground that it was an *initial* project making possible the introduction of gas into Florida. This is its sole justification for the attempted distinction between that case and the instant case. Just how the Commission rationalizes that the merits of an initial supply of gas, *per se*, because it is an initial supply, are more meritorious than an additional supply to another area whose merits are of a definitely superior order is again a logical enigma.

The remainder of the full quotation set out above reads as follows:

> "However, in this case there are no such substantial benefits to the consuming public to outweigh the detriments cited above. On such a record, we must deny the permission requested."

If the Commission had made the findings in Section IV above (Pages 7-A to 21), which they erroneously failed to make, the gross error in the above statement would stand out in high relief. If the Commission will correct the errors alleged in Section IV above there would be effected an automatic obliteration of the last quoted statement of the Commission. Again, we urgently request the Commission to read Appendix B attached hereto, containing the conclusion of the authorities on the deleterious effects of air pollution.

(11) The Commission erred in adopting and relying for its decision upon the erroneous proposition of law and legal conclusions embodied in the second and third paragraphs on Page 5 of its opinion which read as follows:

"With respect to end use, the presiding examiner took the position, in concluding to authorize Transco's X-20 proposal, that end use of gas is not a factor to be considered in applying the standard of public convenience and necessity to a proposed transportation, so long as the end use has no relationship to or effect on any jurisdictional service. On the alternative that end use is to be considered, however, the presiding examiner was of the view that the X-20 service should be denied.

"Although we agree that the X-20 service should be denied, we disagree with the presiding examiner's conclusion that end use is not to be considered in a case of this kind. The Court of Appeals for the District of Columbia Circuit held in *National Coal Association* v. *F.P.C.*, 191 F.2d 462, 467 (1951) that, with respect to a 'sale' of gas, end use is an element to be considered in the 'complex' of public convenience and necessity, although not a determinative factor, and we have similarly held. And we see no justification for concluding that the same is not true in the case of the 'transportation' of gas, to which the standard of public convenience and necessity is equally applicable under the statute. *Cf., Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F. 2d 487 (CA 3, 1956), *cert.* den., 352 U.S. 891. Accordingly the presiding examiner's contrary determinations on this issue with respect to the scope of Section 7(e) should be reversed."

We have heretofore demonstrated the errors of the Commission in relying upon the factors or "policy considerations" which have been discussed in this Section V up to this point. If we are correct in such allegations of error, we find that the sole standard or criterion which is left to the Commission as a basis for denial of certificate is the fact that the 50,000 Mcf per day of X-20 gas is to be burned under Consolidated Edison's boilers. It is still to be kept in mind that billions of the Btu's created by the gas are converted into steam for heating buildings in New York City

[283] which, by any standards, can hardly be called inferior use. But irrespective of this fact, and assuming that all of the gas were to be burned for the generation of electricity, we still find the Commission left with a single standard, "boiler fuel use," as the basis for the certificate denial.

We do not believe that the Court's decision in *National Coal Association* v. *F.P.C.*, 191 F. 2d 462, 467 (1951) can be tortured into the proposition that the Commission can accumulate a series of errors into a " 'complex' of public convenience and necessity" and then use the "complex" as thus fabricated as a basis for the certificate denial. Let us take a close look at what the Court said in that case (page 467):

> "Coming now to the merits, petitioners say that before the Commission can grant a certificate of necessity, it must consider as *separate* and *independent elements* (1) the effect of issuance of the certificate upon competing fuels and transportation and related labor interests, and (2) the relation of the project to conservation of natural gas. Although considerations such as those suggested by petitioners may well be part of the *complex* out of which the Commission's judgment as to 'public convenience and necessity' arises, *they are nowhere made standards governing the issuance or denial of certificates.* Even if the Act be construed to confer a right upon competing fuels and transportation to participate in Commission proceedings and to vindicate the public interest on review, it does not follow that the interests of such groups in retention of markets may bar issuance of a certificate found to satisfy the *explicit* criteria furnished by § 7(e) of the Act." (Emphasis supplied.)

It is said that "the strength of a chain is that of its weakest link." Assuming purely arguendo that the Commission may give some undefined legally operative consideration to "end use," it cannot give that factor controlling effect. And

that is precisely what the Commission is attempting to do here. The Commission further relies upon *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F. 2d 467 (C.A. 3, 1956), *cert. den.*, 352 U.S. 891. Let us also take a close look at that decision. At Page 471, the Court states its decisional basis:

> "• • • the Commission • • • is, among other things, fundamentally concerned with the effect the issuance of the certificate would have on the applicant pipeline's present service to its existing customers."

At Page 472, the Court reiterated the basis for its decision:

> "The Commission, back in its 1946 report to the Congress presented its position accurately when it said: 'While the Commission does not have jurisdiction over direct sales to an industrial consumer as such, it does have the duty of protecting the public interest by preventing a natural gas company from using facilities subject to the Commission's jurisdiction *for a purpose impairing ability to provide adequate and reasonable natural gas service to existing customers.*'" (Emphasis supplied.)

And the Court went on to observe:

> "And we find nothing in any of the situations before us justifying the conclusion that the Commission is endeavouring to extend its transportation authority to embrace *control* of direct sales." (Emphasis supplied.)

Under allegation of error Number 5 of this Section V above, we pointed out conclusively that the proposed X-20 service will in no wise "impair Transco's ability to provide adequate and reasonable natural gas service to its existing customers" and we went further and pointed out that it would in no wise impair adequate and reasonable natural gas service to *future* customers. Therefore, the Commission was clearly in error in erecting the house of cards which it denominates its "complex" of public convenience and necessity.

[285] (12) Transcontinental excepts to the following conclusion of the Commission (p. 6):

> "The present facts do not support the boiler fuel usage proposed here, however, for the reasons stated herein. As set forth in the foregoing discussion, the other elements of public convenience and necessity outweigh the benefits which would likely flow from authorizing this inferior usage of this gas."

This conclusion is mere repetition of the facts and propositions theretofore stated in the opinion, as to each of which Transcontinental has alleged error, stating its reasons for those allegations. We are forced to repeat, however, that just what the Commission means by "inferior use" when confronted with the record in this case is beyond the imagination.

(13) Transcontinental reiterates its exception to the repitition of the following statement (p. 6):

> "Although as indicated, the idea of ameliorating a smoke condition found unpleasant and annoying by the workers in a unique facility, the United Nations headquarters building, is an attractive one, more weighty considerations compel the denial of the grant."

No more pointed illustration of this Commissions total disregard of the record in this case can be conceived of. Of all the testimony of Dr. Greenburg and the cognate testimony of Otto Mantz, the reference to the United Nations Headquarters Building was a single incidental element. In this connection the Commission is urgently requested to reread the material appearing in Section IV of this Petition. (*supra* pp. 7-A through 20.)

(14) Transcontinental objects to the following statement appearing at page 6. It is utterly irrelevant and inconsequential:

> "In fact, the Waterside station consists of two plants, in only one of which, Waterside No. 2, does Consoli-

dated Edison propose to burn the 50,000 Mcf of gas per day proposed to be transported by Transco. Furthermore, the gas would be burned in only eight boilers at that plant."

Is it the Commission's position that all of the contamination of the air in New York City should be wiped out at one fell swoop, or that none of it should be wiped out; in other words, unless the instant aplication, the complete job can be done at once, no start on the long range program should be undertaken? Any such rationalization does not fall in the realm of reason; it is utterly unreasonable.

(15) Transcontinental excepts to the following statement of the Commission as any possible basis for denying a certificate (p. 6):

"In addition, the increased volumes of gas which it is contemplated would in the future be transported by Transco—the X-20 proposal contemplates the transportation ultimately of some 120,000 Mcf of gas per day—would not be used at the Waterside station at all but would, it appears, be burned at some other facility."

Let us repeat that the instant application is to furnish 50,000 Mcf per day and not 120,000 Mcf per day. When, as and if a further application is made by Transcontinental to supply the additional 70,000 Mcf, it will then be adequate time for the Commission to pass upon the merits of *that* 70,000 per day proposal. However, if we are going to touch upon the additional 70,000 Mcf per day, which is not involved in this proceeding, suffice it to say that all or most of the said 70,000 Mcf per day which is not involved in this proceeding would be used in the East River Station of Consolidated Edison as to which the air pollution problem is equally as aggravated as that in connection with the Waterside Station. There is extensive evidence in the record in respect to the East River Station (See allegations of error 10 and 11 under Section IV above). But let us confine our-

[287] selves to the other 50,000 Mcf which is the subject of the instant application.

Transco again excepts to the following repetitive statement of the Commission as immaterial, speculative and not essential as a pertinent part of the record upon which the instant application is to be granted or denied (p. 6):

> "In addition, of the volumes of gas to be utilized by Consolidated Edison in 1960 aggregating some 105,874 MMcf, only 46,560 MMcf would be for natural-gas sales, as compared with some 55,624 MMcf, or over half, which would be burned beneath Consolidated Edison's boilers."

The figures used include the 70,000 Mcf balance of the "contemplated" 120,000 Mcf per day, which 70,00 is *not* a part of the instant application. Therefore, the annual figures as stated by the Commission are as speculative as its guesses about the 7,000 Mcf per day. Furthermore, a large part of the annual figure of 105,874 MMcf referred to by the Commission has already been certificated by it as a part of Consolidated Edison's purchase of quantities of gas for general use.

VI.

In the light of all of the foregoing, Transcontinental offers the following terse observations:

1. By all "conventional" standards, on the *facts* of this record as distinguished from insupportable "policy considerations" the Commission has determined that Transcontinental would be entitled to the certificate applied for.

2. The Commission has totally disregarded the facts, and taking off into the stratosphere has, under the guise of "policy considerations" denied the application.

3. The policy considerations set out in the opinion are not based on any fact in this record and are purely speculative and chimerical.

CONCLUSION

Wherefore, Transcontinental Gas Pipe Line Corporation prays:

1. That the Commission make the findings of fact referred to in Section IV hereof which it has erroneously failed to make; and

2. That in view of the long period of time that this case has been pending the Commission forthwith reverse its decision and permit Transcontinental and Consolidated Edison to go forward with their projects and effectuate a great benefit to the public interest.

Respectfully submitted,

TRANSCONTINENTAL GAS PIPE LINE CORPORATION
By RICHARD J. CONNOR
Its Attorney

JAMES B. HENDERSON
WILLIAM N. BONNER, JR.
JOHN T. MILLER, JR.
Attorneys for Transcontinental Gas Pipe Line Corporation

[289]

APPENDIX B TO EXHIBIT B

Sulphur Dioxide in Air Pollution—Conclusions of Authorities and Bibliography.

The United States Bureau of Mines comes to the following conclusion:

> "Contamination of the atmosphere by sulfur dioxide, whether in dilute concentrations of *0.05* to *0.3* volume-percent (*such as in the flue gases of powerplants*) or as much as 5 to 10 percent (as in the roaster gases of smelter plants) *long has been a public health problem.*"[1] (Emphasis supplied)

[1] Bureau of Mines Information Circular 7836, United States Department of the Interior—1958, Page 1.

[290] Significantly, the Public Health Service branch of the United States Department of Health, Education and Welfare has found the following:

> *"In New York City, air measurements frequently reveal 1 to 2 parts of sulphur dioxide to 1 million parts of air and occasionally there have been as much as 3 parts per million."*[2] (Emphasis supplied)

As pointed out by the U. S. Department of Health, an urban atmosphere contaminated with sulphur dioxide in excess of 0.5 has the following deleterious effects on both the physical well-being of the inhabitants residing in the area and the physical properties located therein:

> "Sulfur oxides in the air are known to make breathing more difficult, even in concentrations commonly found in some of our cities."[3]

In a recent report presented to the National Advisory Committee on Air Pollution, prepared by, among others, Dr. Richard A. Prindle, Chief of the Air Pollution Medical Branch, Division of Special Health Services, Public Health Service, the following is stated:

> "The second major subject has to do with the effect of air pollution on man's breathing ability. *The effects found thus far are essentially* those resulting from irritation. The important findings include the following:
>
> 1. *Irritant gases, such as sulfur dioxide* and ozone in amounts *similar to those in community air, have an*

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[2] "Economic Effects of Air Pollution," U.S. Department of Health Education, and Welfare, U.S. Government Printing Office: 1958 —O—486591, Page 4.

[3] "The Health Effects of Air Pollution", U.S. Department of Health, Education, and Welfare, Public Health Service Publication No. 640, Page 5.

adverse effect upon man's ability to breathe."[1] Emphasis supplied)

In an early report in the New York State Medical Journal prepared in 1928, the following was stated:

> "Those sections of Staten Island exposed to smoke fumes and gas *show a higher cancer death rate* than those not so exposed."[2] (Emphasis supplied)

An investigation into the thick fog which covered the Meuse Valley in Belgium in 1930, causing numerous fatalities, disclosed that there were high concentrations of sulphur dioxide in the fog blanket. The investigation further concluded that:

> "• • • since finely divided drops of H_2SO_4 [sulphuric acid] irritate the upper respiratory tract and SO_2 [*sulphur dioxide*] *penetrates and irritates the depths of the respiratory tract,* these 2 substances account very well for the observed physiopathological symptoms."[3] (Emphasis and bracket material supplied)

In the unfortunate Donora, Pennsylvania, tragedy caused by the blanket of contaminated fog caused the death of many residents, there were again high concentrations of *sulphur dioxide.* Dr. Mark D. Hollis, Assistant Surgeon General of the United States, stated:

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[1] "Progress in Medical Research on Air Pollution" presented at a meeting of the National Advisory Committee on Air Pollution, August 28, 1958, Public Health Reports, Vol. 73, No. 12, December 1958.

[2] Meyers, J.: A study of cancer death-rate variations, combustion products of fuel, topography, and population. N.Y. State J. Med. 28:365-72, 1928.

[3] Annotated Bibliography, The Effects of Atmospheric Pollution on the Health of Man, 1957, The Kettering Laboratory in the Department of Preventive Medicine and Industrial Health, College of Medicine, University of Cincinnati, Cincinnati, Ohio, Page 11.

[292] "In the case of Donora, there were heavy concentrations of sulfur dioxide—a *toxic* material—as well as other materials."[1]

In England, Dr. P. J. Lawther is following the health of some two hundred chronic bronchitis patients at St. Bartholomew's Hospital wards and out-patient clinics, and has published an interim report that these patients tend to feel worse immediately before the onset of visible fog, and that their symptoms also decrease in exactly the same pattern as do *simultaneous measurements of smoke and sulfur dioxide.*[2]

In a recent United States Public Health Service article, the following was stated:

"The difference between how people feel on a clear day and on a day when the air is acrid with smog *cannot be measured in dollars and cents,* although it unquestionably has an effect on efficiency and smooth working relationships.

"Equally intangible is the long-term effect of breathing toxic pollutants in diluted amounts, although we do know that the death rates from cancers of the respiratory system are about twice as high in large cities as in rural areas, regardless of individual smoking habits. We also know that smoggy days are apt to be bad days for patients with heart disease, asthma, emphysema, and other chronic conditions.

"Therefore, it seems reasonable to believe that some

[1] "Fresh Air Getting Scarce in U.S.?", Interview with Dr. Mark D. Hollis, Assistant Surgeon General of U.S., U.S. News & World Report, Oct. 17, 1958, Page 71.

[2] "Chronic Bronchitis in Relation to Air Pollution in Great Britain" by Dr. Geoffrey C. Carey, Department of Preventive Medicine and Industrial Hygiene, University of Cincinnati, presented Wednesday, November 19, 1958, at the National Conference on Air Pollution, Sheraton-Park Hotel, Washington, D. C.

portion of the Nation's annual $21 billion hospital and medical bill can be attributed to air pollution."[1]

Dr. Mark D. Hollis, Assistant Surgeon General of the United States, has stated that:

> "• • • a material like common salt in the air would step up the *toxicity of sulfur dioxide 30 or 40-fold.*"[2]. (Emphasis supplied)

In a speech by Dr. John R. Goldsmith, as recently as last November, he stated:

> "A study by Dr. Mary Amdur at Harvard has developed a method for measuring the effect of gases on the airway resistance of guinea pigs using principally sulfur dioxide. One startling result of her work is the finding that the presence of minute droplets of *common salt solution* in the air greatly increases the sensitivity of the guinea pig to sulfur dioxide. *In fact in the presence* of salt mist, the concentration of SO^2 [sulphur dioxide] at which the guinea pig resistance increases is very near that which occurs during the air pollution episodes in which SO^2 is a major pollutant."[3] (Emphasis and bracketed material supplied).

The foregoing achieves added significance when it is realized that New York City is virtually surrounded by salt water with the attendant salt mist in the atmosphere, thus obviously magnifying the toxicity of the sulphur

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[1] "Economic Effects of Air Pollution," U.S. Department of Health, Education, and Welfare, Public Health Service, U.S. Government Printing Office: 1958—O—486591, Page 4.

[2] "Fresh Air Getting Scarce in U.S.?", Interview with Dr. Mark D. Hollis, U.S. News & World Report, Oct. 17, 1958, Page 71.

[3] "Air Pollution and Lung Function Changes" by Dr. John R. Goldsmith, Head, Air Pollution Medical Studies, California State Department of Public Health, Berkeley, presented Wednesday, November 19, 1958, at the National Conference on Air Pollution, Sheraton-Park Hotel, Washington, D. C.

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[294] dioxide emitted through the stacks of power plants burning fuels containing high concentrates of sulphur dioxide.

In a most recent study by Dr. Percy Stocks with reference to air pollution, bronchitis and cancer, the following is stated:

> "When standardized mortality ratios for bronchitis and cancers in the county boroughs of England and Wales are related to the average amounts of undissolved deposit and smoke from the air in those towns, highly significant statistical correlations are found for bronchitis and lung cancer with both types of pollution after eliminating the effects of population density on the correlations. In all administrative areas in Lanchashire and the West Riding of Yorkshire having the necessary pollution data bronchitis is significantly correlated with deposit but not with smoke, whilst for lung cancer the reverse is the case."[2]

Another deleterious effect of sulphur dioxide in the atmosphere is its corrosion effect on all kinds of buildings and materials. The United States Public Health Service has found that:

> "Sulphur compounds corrode every kind of building material, including stone. *As little as 0.5 parts of sulphur dioxide per million parts of air will produce some corrosion.*"[1] (Underscoring supplied)

In an early article written in 1907 by T. W. Schaefer, the author reports that, for the 10 years previous to 1907, he had studied the noxious effect of SO_2 [sulphur dioxide] and he concluded that it is one of the most patent causes

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[2] "Cancer and Bronchitis Mortality in Relation to Atmospheric Deposit and Smoke" by Percy Stocks, C.M.G., M.D., F.R.C.P., Colwyn Bay, North Wales, British Medical Journal, January 10, 1959, vol. i, pp. 74-79.

[1] "Economic Effects of Air Pollution," U.S. Department of Health, Education, and Welfare, Public Health Service, U.S. Government Printing Office: 1958—O—486591, Page 4.

5] of asthma. He estimated that for every ton of coal burned, 3 tons of CO_2 are formed. Further, SO^2 is formed from the FeS^2 that occurs in ca. 3% concentration in coal. H_2SO^3 is formed from SO^2, and this is very detrimental to *buildings* and vegetation. Not only may dust particles act as condensing nuclei for fog, but, it is believed, heavy gases, e.g., SO^2 and CO_2, may act similarly. He stated further:

> "It is a well-recognized fact that, during periods of heavy fogs in manufacturing centers, the morbidity and mortality from respiratory diseases are increased very greatly, and that, as the atmosphere clears, a sharp decline follows."

SO^2 is a local irritant producing coughing, bronchitis and pneumonia.[2] This article of 50 years ago with respect to the fact that sulphur dioxide acts as a nuclei for fog is again asserted to be a fact in a more recent article written by A. C. Stern in 1945. In that article Mr. Stern states:

> "The pollutant best able to stabilize a fog is SO_2 which in a mist can oxidize to SO_3. A droplet of H_2SO_4, the form in which SO_3 would exist in a mist, will be stable at a lower relative humidity than a droplet of H_2O. Therefore, once a fog is formed in an atmosphere containing SO_2, it will tend to be a more persistent fog than one in an unpolluted atmosphere."[1]

For further investigation of air pollution reference is invited to the 481 page study of The Kettering Laboratory of the University of Cincinnati entitled "Annotated Bibliography—The Effects of Atmospheric Pollution on the Health of Man (1957)."

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[2] Schaefer, T. W.: The Contamination of the Air of our Cities with Sulphur Dioxide, the Cause of Respiratory Disease. Boston Med. Surg. J. 157:106-10, 1907.

[1] Stern, A. C.: Atmospheric Pollution Due to Smoke. Heating and Ventilating 42:67-70, 1945.

[296] (File endorsement omitted.)

IN UNITED STATES COURT OF APPEALS FOR THE THIRD COURT

No. 12908

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

MOTION FOR LEAVE TO INTERVENE BY NATIONAL COAL ASSOCIATION, UNITED MINE WORKERS OF AMERICA, AND FUELS RESEARCH COUNCIL, INC., FILED MAY 4, 1959

To the Honorable Judges of the United States Court of Appeals for the Third Circuit:

National Coal Association, United Mine Workers of America and Fuels Research Council, Inc., (hereinafter referred to as Movants) respectfully, jointly and severally move this Honorable Court for leave to intervene in the above entitled cause in support of the Order of the Federal Power Commis-
[297] sion issued January 30, 1959, in the administrative proceedings entitled "In the Matters of Transcontinental Gas Pipe Line Corporation, Docket Nos. G–13143, G–13590 and G–13745, New York State Natural Gas Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Docket No. G–13793" which the Petitioner, Consolidated Edison Company of New York, Inc., (hereinafter sometimes referred to as Con. Ed.) seeks to have reviewed and set aside in this proceeding. In support of this Motion your Movants respectfully state:

I

National Coal Association, with its principal office in the Southern Building, Washington 5, D.C., is a voluntary, non-profit organization incorporated under the laws of the State of Delaware. Its membership embraces owners and operators of bituminous coal mines producing approximately four-fifths of the total commercial bituminous coal mined in the United States with members in every bituminous coal producing State in the Union. Said National Coal Association was formed for and its functions include the promotion of the welfare and protection of the interests of its members, as such interests may be affected by, among other things, the sale and use of competitive fuels.

United Mine Workers of America, with its principal office at 900 15th Street, NW., Washington 5, D.C., is a voluntary, unincorporated, non-profit association organized for the protection and welfare of the mine workers belonging to and affiliated with it; its members number approximately
[298] 300,000 persons engaged in the actual mining and production of coal in coal mines located in various States of the Union.

Fuels Research Council, Inc., with its principal office at Room 520 Shoreham Building in the City of Washington, D.C., is a voluntary, non-profit organization incorporated under the laws of the State of Delaware. Its purpose is to and it does represent numerous persons, associations and corporations engaged in the mining, processing, transportation and sale of bituminous coal, coke and anthracite, in research and other matters relating to or bearing upon competitive relationships between coal, coke and other fuels. Your Movant as a corporation affords membership to such persons, associations and other corporations and presently numbers among its members various groups representative of bituminous coal and anthracite mine operators, railroads engaged in hauling bituminous coal, coke and anthracite, as well as persons and corporations engaged in and dependent for their existence upon the transportation of water-borne coal, coke and anthracite.

II

By an Order issued by the Federal Power Commission under date of March 28, 1958, your Movants, on behalf of themselves and their members, were permitted to intervene in and become parties to the proceedings which the Petitioner herein seeks to have reviewed. Your Movants, represented by counsel, participated in all phases of the proceedings before the Federal Power Commission. The intervention by your Mov-
[299] ants and the full participation in the hearings conducted upon the application of Transcontinental Gas Pipe Line Corporation (hereinafter referred to as Transco) for a certificate of public convenience and necessity was based upon the fact that the construction of the facilities for which such certificate was sought would have resulted in the transmission of large quantities of natural gas for use as boiler fuel displacing coal produced, processed and transported by members of your Movants with resultant loss in revenue to coal mine operators, a substantial loss to coal mine workers in wages and opportunities for employment, and a deprivation to the railroads of large quantities of coal tonnage that might otherwise be transported by them, all to the serious detriment of your Movants and their members.

III

Your Movants respectfully submit that they have a substantial, direct interest in opposing the petition of Con. Ed. to review and set aside the Federal Power Commission's Order which denied the application of Transco for a certificate of public convenience and necessity to transport large volumes of natural gas for the account of Con. Ed. and terminated the proceedings with respect thereto.

IV

Attorneys for Petitioner and Respondent have authorized Movants to state herein that they have no objection to the granting of Movants' Motion for Leave to Intervene.

WHEREFORE, National Coal Association, United
[300] Mine Workers of America and Fuels Research Council, Inc., respectfully move this Honorable Court:

1. That pursuant to Rule 18(6) of the Court they be granted the right to intervene as parties in this review proceeding.

2. That they receive notice of all proceedings and be permitted to file briefs and participate in oral argument therein.

3. That they be permitted to participate in the designation of the contents of the printed record on review.

4. That the time in which Movants are required to file their brief in this proceeding be fixed for the same date as that of Respondent, Federal Power Commission.

5. That they be afforded such other and further relief as the Court in the premises deems just and proper.

Respectfully submitted.

NATIONAL COAL ASSOCIATION,
UNITED MINE WORKERS OF AMERICA,
FUELS RESEARCH COUNCIL, INC.;
By Jerome J. McGrath,
[S] JEROME J. McGRATH,
Their Attorney.

Of counsel:

John A. McGrath, McGrath and McGrath, 520 Shoreham Building, Washington 5, D.C.

Robert E. Lee Hall, Southern Building, Washington 5, D.C.

Welly K. Hopkins, 900 15th Street NW., Washington 5, D.C.

Dated at Washington, D.C., this 1st day of May, 1959.

[301] [302] [303]

CERTIFICATE OF SERVICE

(Omitted in printing)

[304] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12908

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Present: McLAUGHLIN, KALODNER, and STALEY, *Circuit Judges*

MOTION FOR LEAVE TO INTERVENE

ORDER ALLOWING INTERVENTION MAY 9, 1959

The motion of National Coal Association, United Mine Workers of America and Fuels Research Council, Inc. for leave to intervene in the above appeal is allowed.

By the Court.

McLAUGHLIN, *Circuit Judge.*

Dated: May 9, 1959.

(File endorsement omitted.)

[305] (File endorsement omitted.)

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12929

THE CITY OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

MOTION FOR LEAVE TO INTERVENE BY NATIONAL COAL ASSOCIATION, UNITED MINE WORKERS OF AMERICA AND FUELS RESEARCH COUNCIL, INC., FILED JUNE 1, 1959

To The Honorable Judges Of The United States Court Of Appeals For The Third Circuit:

National Coal Association, United Mine Workers of America and Fuels Research Council, Inc., (hereinafter referred to as Movants) respectfully, jointly and severally move this Honorable Court for leave to intervene in the above entitled cause in support of the Order of the Federal Power Commission issued January 30, 1959, in the administrative proceedings entitled "In the Matters of Transcontinental Gas Pipe Line Corporation, Docket Nos. G-13143, G-13590 and G-13745, New York State Natural Gas Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Docket No. G-13793" which [306] the Petitioner, The City of New York, seeks to have reviewed and set aside in this proceeding. In support of this Motion your Movants respectfully state:

I

National Coal Association, with its principal office in the Southern Building, Washington 5, D.C., is a voluntary, non-profit organization incorporated under the laws of the State of Delaware. Its membership embraces owners and operators of bituminous coal mines producing approximately four-fifths of the total commercial bituminous coal mined in the United States with members in every bituminous coal producing State in the Union. Said National Coal Association was formed for and its functions include the promotion of the welfare and protection of the interests of its members, as such interests may be affected by, among other things, the sale and use of competitive fuels.

United Mine Workers of America, with its principal office at 900 15th Street, N.W., Washington 5, D.C., is a voluntary, unincorporated, non-profit association organized for the protection and welfare of the mine workers belonging to and affiliated with it; its members number approximately 300,000 persons engaged in the actual mining and production of coal in coal mines located in various States of the Union.

Fuels Research Council, Inc., with its principal office at Room 520 Shoreham Building in the City of Washington, D.C., is a voluntary, non-profit organization incorporated under the laws of the State of Delaware. Its purpose is to and it does represent numerous persons, associations and corporations engaged in the mining, processing, transportation and sale of bituminous coal, coke and anthracite, in research and other matters relating to or bearing upon competitive relationships between coal, coke and other fuels. Your Movant as [307] a corporation affords membership to such persons, associations and other corporations and presently numbers among its members various groups representative of bituminous coal and anthracite mine operators, railroads engaged in hauling bituminous coal, coke and anthracite, as well as persons and corporations engaged in and dependent for their existence upon the transportation of water-borne coal, coke and anthracite.

II

By an Order issued by the Federal Power Commission under date of March 28, 1958, your Movants, on behalf of themselves and their members, were permitted to intervene in and become parties to the proceedings which the Petitioner herein seeks to have reviewed. Your Movants, represented by counsel, participated in all phases of the proceedings before the Federal Power Commission. The intervention by your Movants and the full participation in the hearings conducted upon the application of Transcontinental Gas Pipe Line Corporation (hereinafter referred to as Transco) for a certificate of public convenience and necessity was based upon the fact that the construction of the facilities for which such certificate was sought would have resulted in the transmission of large quantities of natural gas for use as boiler fuel displacing coal produced, processed and transported by members of your Movants with resultant loss in revenue to coal mine operators, a substantial loss to coal mine workers in wages and opportunities for employment, and a deprivation to the railroads of large quantities of coal tonnage that might otherwise be transported by them, all to the serious detriment of your Movants and their members.

III

Your Movants respectfully submit that they have a substantial, direct interest in opposing the petition of The City of New York to review and set aside the Federal Power Commission's Order which denied the application of Transco
[308] for a certificate of public convenience and necessity to transport large volumes of natural gas for the account of Consolidated Edison Company of New York, Inc., and terminated the proceedings with respect thereto. Said Order is also the subject of review by this Court in Case No. 12,908, *sub nom.* Consolidated Edison Company of New York, Inc., v. Federal Power Commission, in which proceeding Movants have moved to intervene.

Attorneys for Petitioner and Respondent have authorized Movants to state herein that they have no objection to the granting of Movants' Motion for Leave to Intervene.

WHEREFORE, National Coal Association, United Mine Workers of America and Fuels Research Council, Inc., respectfully move this Honorable Court:

1. That pursuant to Rule 18(6) of the Court they be granted the right to intervene as parties in this review proceeding.

2. That they receive notice of all proceedings and be permitted to file briefs and participate in oral argument therein.

3. That they be permitted to participate in the designation of the contents of the printed record on review.

4. That the time in which Movants are required to file their brief in this proceeding be fixed for the same date as that of Respondent, Federal Power Commission.

5. That they be afforded such other and further relief as the Court in the premises deems just and proper.

Respectfully submitted.

NATIONAL COAL ASSOCIATION,
UNITED MINE WORKERS OF AMERICA,
FUELS RESEARCH COUNCIL, INC.,
By Jerome J. McGrath,
[S] JEROME J. McGRATH,
Their Attorney.

[309] Of counsel:

John A. McGrath, McGrath and McGrath, 520 Shoreham Building, Washington 5, D.C.

Robert E. Lee Hall, Southern Building, Washington 5, D.C.

Welly K. Hopkins, 900 15th Street NW., Washington 5, D.C.

Robert M. Landis, Barnes, Dechert, Price, Myers & Rhoads, 1600 Three Penn Center Plaza, Philadelphia 2, Pennsylvania.

Dated at Washington, D.C., this 29th day of May, 1959.

[310] [311]

CERTIFICATE OF SERVICE

(Omitted in printing)

[312] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12929

THE CITY OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ORDER ALLOWING INTERVENTION JUNE 4, 1959

Present: GOODRICH, KALODNER and HASTIE, *Circuit Judges.*

The motion of National Coal Association, United Mine Workers of America and Fuels Research Council, Inc., for leave to intervene in the above appeal is allowed.

By the Court.

GOODRICH, *Circuit Judge.*

Dated: June 4, 1959.

(File endorsement omitted.)

[313] (File endorsement omitted)

IN UNITED STATES COURT OF APPEALS FOR THE THIRD COURT

No. 12930

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

MOTION FOR LEAVE TO INTERVENE BY NATIONAL COAL ASSOCIATION, UNITED MINE WORKERS OF AMERICA, AND FUELS RESEARCH COUNCIL, INC., FILED JUNE 5, 1959

To The Honorable Judges Of The United States Court Of Appeals For The Third Circuit:

National Coal Association, United Mine Workers of America and Fuels Research Council, Inc., (hereinafter referred to as Movants) respectfully, jointly and severally move this Honorable Court for leave to intervene in the above entitled cause in support of the Order of the Federal Power Commission issued January 30, 1959, in the administrative proceedings entitled "In the Matters of Transcontinental Gas Pipe Line Corporation, Docket Nos. G–13143, G–13590 and G–13745, New York State Natural Gas Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Docket No. G–13793" which the Petitioner, Transcontinental Gas Pipe Line Corporation, seeks to [314] have reviewed and set aside in this proceeding. In support of this Motion your Movants respectfully state:

I

National Coal Association, with its principal office in the Southern Building, Washington, D.C., is a voluntary, non-profit organization incorporated under the laws of the State of Delaware. Its membership embraces owners and operators of bituminous coal mines producing approximately four-fifths of the total commercial bituminous coal mined in the United States with members in every bituminous coal producing State in the Union. Said National Coal Association was formed for and its functions include the promotion of the welfare and protection of the interests of its members, as such interests may be affected by, among other things, the sale and use of competitive fuels.

United Mine Workers of America, with its principal office at 900-15th Street, N.W., Washington 5, D.C., is a voluntary, unincorporated, non-profit association organized for the protection and welfare of the mine workers belonging to and affiliated with it; its members number approximately 300,000 persons engaged in the actual mining and production of coal in coal mines located in various States of the Union.

Fuels Research Council, Inc., with its principal office at Room 520 Shoreham Building in the City of Washington, D.C., is a voluntary, non-profit organization incorporated under the laws of the State of Delaware. Its purpose is to and it does represent numerous persons, associations and corporations engaged in the mining, processing, transportation and sale of bituminous coal, coke and anthracite, in research and other matters relating to or bearing upon competitive relationships between coal, coke and other fuels. Your Movant, as a corporation affords membership to such persons, associations and other corporations and presently numbers among its members various groups representative of bituminous coal and anthracite mine operators, railroads engaged in hauling bituminous coal, coke and anthracite, as well as persons and corporations engaged in and dependent for their existence upon the transportation of water-borne coal, coke and anthracite.

[315]

II

By an Order issued by the Federal Power Commission under date of March 28, 1958, your Movants, on behalf of themselves and their members, were permitted to intervene in and become parties to the proceedings which the Petitioner herein seeks to have reviewed. Your Movants, represented by counsel, participated in all phases of the proceedings before the Federal Power Commission. The intervention by your Movants and the full participation in the hearings conducted upon the application of Petitioner for a certificate of public convenience and necessity was based upon the fact that the construction of the facilities for which such certificate was sought would have resulted in the transmission of large quantities of natural gas for use as boiler fuel displacing coal produced, processed and transported by members of your Movants with resultant loss in revenue to coal mine operators, a substantial loss to coal mine workers in wages and opportunities for employment, and a deprivation to the railroads of large quantities of coal tonnage that might otherwise be transported by them, all to the serious detriment of your Movants and their members.

III

Your Movants respectfully submit that they have a substantial, direct interest in opposing the Petition herein to review and set aside the Federal Power Commission's Order which denied the application of Petitioner for a certificate of public convenience and necessity to transport large volumes of natural gas for the account of Consolidated Edison Company of New York, Inc., and terminated the proceedings with respect thereto.

IV

Attorneys for Petitioner and Respondent have authorized Movants to state herein that they have no objection [316] to the granting of Movants' Motion for Leave to Intervene.

WHEREFORE, National Coal Association, United Mine Workers of America and Fuels Research Council, Inc., respectfully move this Honorable Court:

1. That pursuant to Rule 18(6) of the Court they be granted the right to intervene as parties in this review proceeding.

2. That they receive notice of all proceedings and be permitted to file briefs and participate in oral argument therein.

3. That they be permitted to participate in the designation of the contents of the printed record on review.

4. That the time in which Movants are required to file their brief in this proceeding be fixed for the same date as that of Respondent, Federal Power Commission.

5. That they be afforded such other and further relief as the Court in the premises deems just and proper.

Respectfully submitted.

NATIONAL COAL ASSOCIATION,
UNITED MINE WORKERS OF AMERICA,
FUELS RESEARCH COUNCIL, INC.
By Jerome J. McGrath,
[S] JEROME J. McGRATH,
Their Attorney.

Of counsel:

John A. McGrath, McGrath and McGrath, 520 Shoreham Building, Washington 5, D.C.

Robert E. Lee Hall, Southern Building, Washington 5, D.C.

Welly K. Hopkins, 900 15th Street NW., Washington 5, D.C.

Robert M. Landis, Barnes, Dechert, Price, Myers & Rhoads, 1600 Three Penn Center Plaza, Philadelphia 2, Pennsylvania.

Dated at Washington, D.C., this 3d day of June, 1959.

557770 O-60-8

[317] [318]

CERTIFICATE OF SERVICE

(Omitted in printing)

[319] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12930

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Present: McLAUGHLIN and STALEY, *Circuit Judges.*

ORDER ALLOWING INTERVENTION JUNE 9, 1959

The motion of National Coal Association, United Mine Workers of America and Fuels Research Council, Inc., for leave to intervene in the above case is allowed.

By the Court.

McLAUGHLIN, *Circuit Judge.*

JUNE 9, 1959.

(File endorsement omitted.)

[320] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 12,908, 12,929 and 12,930

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner in No. 12,908.

THE CITY OF NEW YORK,
Petitioner in No. 12,929.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner in No. 12,930.

v.

FEDERAL POWER COMMISSION,
Respondent

NATIONAL COAL ASSOCIATION,
UNITED MINE WORKERS OF AMERICA,
FUELS RESEARCH COUNCIL, INC.,
Intervenors

SOUTHERN CALIFORNIA GAS COMPANY and SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA
Intervenors

On Petition for Review of Orders of the Federal Power Commission.

Argued September 25, 1959

Before Goodrich, Staley, and Hastie, *Circuit Judges.*

[321] **OPINION OF THE COURT**

November 3, 1959

By GOODRICH, *Circuit Judge.*

We have before us three cases which were consolidated for argument. The main case is a petition by Transcontinental Gas Pipe Line Corporation (Transco) to set aside an order of the Federal Power Commission which refused to issue it a certificate of public convenience and necessity. Another case is a petition by Consolidated Edison Company of New York, Inc. (Con Edison) seeking the same relief. The same is true of the petition brought by the City of New York. Joining with the Commission are intervenors National Coal Association, United Mine Workers of America and Fuels Research Council, Inc. Filing a brief also as amici curiae are Southern California Gas Company and Southern Counties Gas Company of California. For the opinion and order below see *Transcontinental Gas Pipe Line Corp.*, 21 F.P.C. 138, *rehearing denied* 21 F.P.C. 399 (1959).

The essential facts can be briefly stated. Con Edison went into Texas and made a contract with producers for the purchase of natural gas in the Texas field. Then it made an agreement with Transco providing for what is called "X-20 service." Transco agreed to transport the gas to New York and deliver it there to Con Edison. Included in the agreement was a provision for a sixty-day-a-year service which Transco agreed to render Con Edison from its own gas reserves and during the time this service was furnished the Con Edison supply from Texas would not be used. Con Edison agreed with the producers not to sell this gas at retail in New York. It is to be used to fire two of the ten boilers in Con Edison's Waterside plant near 42nd Street and East River in New York City. The City of New York is interested in the litigation because by the substitution of gas for coal, now being used to fire the

2] boilers which Con Edison has at this plant, the very considerable amount of fly ash and the very considerable amount of sulfur dioxide poured into the air in this densely populated portion of New York City will be greatly reduced.

In the opinion and order denying the certificate the Commission agreed that the "conventional requirements" of public convenience and necessity had been satisfied by the showing made.[1] The matter of markets, facilities, gas supply and rates[2] are included in these "conventional requirements." The Commission, however, overruling its presiding examiner, denied the certificate and gave five policy reasons for doing so. Since the soundness of these reasons is the heart of the controversy, we set them out in full in the Commission's language. Here they are:

> 1. "Certainly, if we were to grant this request we would soon be confronted with many requests of the same general character; and granting the X-20 proposal, we would have no fair or rational basis for denying similar such requests."
>
> 2. "Likewise, the authorization of this and like proposals would pre-empt for this usage capacity which would otherwise be available to meet more urgent and widely beneficial public needs[3] even though the bare authorization here sought would not of itself entirely nullify the Leidy Storage project."

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1 21 F.P.C. at 141.

2 The Commission noted in its order that a minor portion of the rate structure, dealing with the rate for the transportation of the "displaced" gas had not, in its opinion, been substantiated on the record. 21 F.P.C. at 141 n. 3. The petitioners dispute this finding. However, all concerned agree "that the Commission did not rely upon that deficiency as a ground for denying the certificate. Had the Commission otherwise been able to grant the certificate, it would presumably have remedied the defect by a condition." Brief for the FPC, p. 5 n. 10.

3 In its Order Denying Application for Rehearing, the Commission stated that "of course there can be no preemption of capacity not already built; but the construction and utilization of given capacity for service of the character proposed here would reasonably lessen the likelihood of capacity being constructed for other and future service of a character more in accordance with the requirements of public convenience and necessity." 21 F.P.C. at 402.

[323] 3. "The impact of large demand on relatively limited supply is certain enough to raise rates and field prices if only one bidder is bringing that demand to bear on the supply. How much more serious is that impact when it is in the form of multiple bidders, each attempting to reserve to itself a firm supply. Inevitably, there would be upward pressure on rate levels in the fields. We do not believe we ought to encourage such when it is unnecessary."

4. "Large purchasers of gas, like Consolidated Edison, can readily compete with pipelines for gas purchases. * * * But the smaller purchaser may not be as fortunate. He will have to rely on the pipeline supplier. And how long the pipeline can continue to buy in competition with nonjurisdictional, large volume purchasers, or indeed, how willing it might be to undertake such less desirable service, is at least a question."

5. "These are all factors that weigh against the grant. They would confound and make more difficult a decision in such a case as this even if the gas were to be used for a demonstrably superior use. But when the purpose for which the sale would be made is something less than desirable, they take on more serious, even controlling, significance."[4]

When the basis of the controversy is understood it gets down to a point which is easily stated although difficult to answer. It is agreed by all parties that the purchase by Con Edison of the gas in Texas is not subject to the jurisdiction of the Commission. Con Edison can buy as much gas as it can pay for in Texas and there is nothing the Commission can do about it. The same is true of the use which Con Edison makes of this gas when it gets to New York. Since it is not to be the subject of re-sale in that state, the Commission has nothing to say about its use either.

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4 21 F.P.C. at 141.

Section 1 (b) of the Natural Gas Act[5] sets out specifically its coverage as follows:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 15 U.S.C.A. § 717(b).

As the presiding examiner pointed out in his opinion,[6] if Con Edison could liquefy this gas and transport it by truck or by ship to New York City there would be nothing for the Commission to take hold of. The question, therefore, comes down to the scope of the authority of the Commission given by Section 7 of the Act which provides for the certificate of convenience and necessity.[7] How far does this phrase let the Commission go?

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5 15 U.S.C.A. § 717-717w.

6 Transcontinental Gas Pipe Line Corp., 20 F.P.C. 303, 316 (1958).

7 "No natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. . . ." 15 U.S.C.A. § 717f(c).

"Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C.A. § 717f(e).

[325] Anyone can see that the phrase is a vague one, something like "due process of law," out of which one can get what he cares to put in. It is, obviously, the kind of a phrase where experience through the years builds up criteria which must be met in determining its content. Such experience-built criteria were what the Commission looked at when it saw that the "conventional requirements" for convenience and necessity had been met.

Our conclusion in these cases is that the Commission has gone beyond its authority in denying the certificate here. We think that what the Commission has in effect done is to assert, by its examination and disapproval of the end use to be made of this gas, a general allocation and conservation authority over the natural gas fields of the United States. Inspection of the reasons assigned by the Commission for its denial shows clearly, we think, that it disapproves of the use to be made of this gas in New York City as boiler fuel, as contrasted with the use possibly to be made of it were it to be devoted, at some future time, to house heating and domestic use.

The Commission's argument to this Court talks about interstitial legislative authority to be exercised by a regulatory body: This is quite all right; we agree that the administrative process may clothe the skeleton of a statute with flesh, as the Commission argues. But the interstitial process cannot put new provisions into a statute. That general statement everybody would agree upon. The question is, has it done so here?

The Commission's brief talks about the "inadequacy of state power to reconcile conflicting state interests."[8] This bold assertion requires us to examine carefully the legislative history behind the statute.

The 1936 report of the Federal Trade Commission to the Senate, which is specifically singled out in the introductory clause of section 1(a) of the Natural Gas Act as a

8 Brief for the FPC, p. 40.

source of the policy of the Act,[9] is relied on by the Commission as authority for its consideration of the end use to be made of the gas in exercising its certificating jurisdiction. It cannot be disputed that the report, which runs over 600 pages, makes a brief mention of the conflict between industrial and household uses.[10] But it is only a brief mention that is made; in neither its summary of findings [11] nor in its conclusions and recommendations [12] does the report make any mention of the matter. It is true that in its enumerated conclusions the report refers to "conservation." But a closer reading of that conclusion, together with the emphasis of the rest of the report, reveals that what was really being referred to was physical waste in the production aspects and the use of gas in gasoline extraction and the manufacture of carbon black.[13] In its listing of 16 specific evils in

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9 "As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C.A. § 717(a).

10 "The present transportation of natural gas in the large pipeline systems is intimately concerned with the sale of large or major portions of the gas so transported to industries of the general type outlined above. [This refers to use of gas for electric power plants, firing of large boilers and furnaces, brick kilns, steel mills, etc.] The gas industry claims that the supply to general consumers at prevailing prices is only made possible by the quantity sales to industry in direct competition with coal and oil. Whether such a situation is essential to maintain service at moderate prices is one problem, but it does not eliminate the fact that every thousand feet used to replace coal in large operations has diminished the future supply of natural gas available for the householder and other retail consumers, which may be considered the highest grade of service to which natural gas may be put." Federal Trade Commission, *Final Report to the Senate of the United States*, S. Doc. No. 92, Part 84-A, 70th Cong., 1st Sess. 125 (1936).

11 *Id.* at 581-606.

12 *Id.* at 607-17.

13 "1. Conservation is the first problem that demands attention. Vast acreage is being drained and natural gas is being subjected to profligate and wanton waste and uneconomical uses. This has been estimated to amount to as much as a billion and a quarter cubic feet per day in one field. Witnesses having expert knowledge testified that this amount of *daily waste* is sufficient to supply the entire present needs of the domestic and commercial users of natural gas in the United States." *Id.* at 608 (emphasis supplied). This is clearly referring to the waste type problems discussed earlier in the report. *Id.* at 92-101.

[327] the industry the report refers to "a great waste of natural gas in *production*," but nowhere refers to end use problems.[14]

The sole recommendation of the report with respect to "conservation" was that the producing states enter into interstate compacts with each other[15] with accompanying "Federal legislation prohibiting the transportation in interstate or foreign commerce of natural gas *produced or released from storage* in excess of the State's quota or *produced* in violation of other State conservation laws and regulations."[16] It also recommended that a federal agency "be empowered to investigate the supply of and demand for natural gas throughout the country, to keep such information current, and to advise and recommend to State regulatory boards regarding the proper amount to be fixed by them from time to time as the several State quotas."[17] The result of this advice was the enactment of Section 11 of the Natural Gas Act which empowered the Federal Power Commission to assemble information and report to Congress with respect to interstate compacts,[18] and nothing more.

14 *Id.* at 615-16 (emphasis supplied).

15 *Id.* at 612.

16 *Id.* at 613 (emphasis supplied).

17 *Ibid.*

18 "(a) In case two or more States propose to the Congress compacts dealing with the conservation, production, transportation, or distribution of natural gas it shall be the duty of the Commission to assemble pertinent information relative to the matters covered in any such proposed compact, to make public and to report to the Congress information so obtained, together with such recommendations for further legislation as may appear to be appropriate or necessary to carry out the purposes of such proposed compact and to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas.

"(b) It shall be the duty of the Commission to assemble and keep current pertinent information relative to the effect and operation of any compact between two or more States heretofore or hereafter approved by the Congress, to make such information public, and to report to the Congress, from time to time, the information so obtained, together with such recommendations as may appear to be appropriate or necessary to promote the purposes of such compact.

"(c) In carrying out the purposes of this chapter, the Commission shall, so far as practicable, avail itself of the services, records, reports, and information of the executive departments and other agencies of the Government, and the President may, from time to time, direct that such services and facilities be made available to the Commission." 15 U.S.C.A. § 717j.

Thus Congressman Mapes, a member of the House Interstate and Foreign Commerce Committee which drafted the bill, was able to state to the House, sitting as the Committee of the Whole, that "the only provision of the bill [which was eventually enacted] which seems to look to the conservation of the natural gas resources of the country is contained in the provision relating to the State compacts." [19]

That the 1938 Act did not give the Commission power to deal with conservation considerations was well recognized by the Commission itself in its 1940 Annual Report in which it recommended a broadening of the Act to give it power to resolve conservation problems.[20]

The statute was amended in 1942.[21] But that the 1942 amendments did not give the Commission its requested power is also apparent. Neither the committee hearings [22] nor the committee reports [23] make any mention of the Commission's concern with respect to conservation. But even more important is the Commission's own concession of lack of such power which appears in its 1944 report to Con-

19 81 CONG. REC. 6726 (1937).

20 A proposal "to tap the Southwestern reserves of natural gas to supply the tremendous markets available in the Northeastern States poses the country with a serious problem of energy resource conservation. The Natural Gas Act as presently drafted does not enable the Commission to treat fully the serious implications of such a problem. The question should be raised as to whether the proposed use of natural gas would not result in displacing a less valuable fuel and create hardships in the industry already supplying the market, while at the same time rapidly depleting the country's natural gas resources.

"Careful study of the entire problem may lead to the conclusion that use of natural gas should be restricted by functions rather than by areas. . . . General use of natural gas under boilers for the production of steam is . . . under most circumstances of very questionable social economy.

". . .

"The Commission is convinced that these conservation problems are of such preeminent importance, especially in the present world situation, that the Natural Gas Act should be immediately broadened to give the Commission adequate power to resolve them in the public interest." 20 FPC ANN. REP. 79-80 (1940).

21 56 Stat. 83-84 (1942).

22 *Hearings on H.R. 5249, Before the House Committee on Interstate and Foreign Commerce*, 77th Cong., 1st Sess. (1941).

23 H.R. REP. No. 1290, 77th Cong., 1st Sess. (1941); S. REP. No. 948, 77th Cong., 2d Sess. (1942).

[329] gress;[24] this report followed closely on the heels of the *Hope*[25] decision on which the Commission so heavily relies.

This Court does not say that the interstate compact was, or is, the best way to handle the conservation problem. What we do say is that this is what the Congress provided.

In 1944, the same year as the Commission's report to Congress, considerations of the end use to which the gas was to be applied began to appear in the Commission's orders and opinions in certificate proceedings. Although in the initial case the Commission refused, because of the pendency of its Natural Gas Investigation, to give any weight to the contention that use of gas for boiler fuel purposes was undesirable,[26] in later cases such a contention was clearly considered as a factor weighing against the

24 "The Commission is keenly aware of the importance of conservation and the serious problems raised by the continued construction of large natural-gas pipe lines and the accelerated depletion of our natural-gas reserves due to war activities. In its annual report to Congress for the year 1940 the Commission discussed this question at some length. In that report a number of important questions were raised, but it would appear that further studies and investigations must be conducted before satisfactory answers to these important and difficult questions can be formulated.

"In its hearings on certificate cases, under section 7 (c) of the act, as amended, the Commission has freely permitted the intervention of representatives of coal, railroad, labor, and other interests concerned with the production or transportation of competing fuels. These interests have presented extensive evidence on the economic, sociological, and technological aspects of fuel competition, and their representatives have strongly urged the Commission either to deny certificates on the general grounds of conservation or to attach restrictions which would severely limit the uses for which natural gas might be sold.

"It has been the unanimous view of the Commission that, inasmuch as the Congress had not given it comprehensive powers to deal with the end uses for which natural gas is consumed, and had granted the Commission no authority to regulate rates for the direct sales of natural gas to industry, it was the duty of the Commission not to seek to exercise such authority until the Congress amended the Natural Gas Act to confer on the Commission such specific powers as Congress desired it to exercise." Federal Power Commission, *The First Five Years Under the Natural Gas Act* 15 (1944). The Commission itself thought these paragraphs important enough to quote in full in its own five-page press release on the report. See FPC Release No. 230, January 23, 1944.

25 FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).

26 Memphis Natural Gas Co., 4 F.P.C. 197 (1944), *aff'd sub nom.* Department of Conservation v. FPC, 148 F.2d 746 (5th Cir.), *cert. denied*, 326 U.S. 717 (1945). The Commission also pointed out in its opinion that the application involved extension of facilities adequately to supply present customers rather than to supply new customers.

granting of a certificate.[27] Other factors weighing for or against the proposed boiler fuel use in these cases included such matters as national defense, discrimination against other industrial customers, effect on existing customers, whether the service was to be part time or full time, proximity of the proposed customer to coal fields, effect on the pipe line's revenues, and the relative demand for natural gas by domestic and other industrial consumers in the area to be served.

In only four of these cases was the application for a certificate actually denied, and in one of them, the certificate was eventually granted on a rehearing a few years later.[28] In another case, the customer seeking to purchase the gas for boiler fuel was eventually successful in obtaining it, although in smaller amounts, from another pipe line subject to the Commission's jurisdiction.[29] In still another instance a pipe line's application to supply gas to two customers for boiler fuel use was denied,[30] but that same pipe

27 Northern Natural Gas Co., 4 F.P.C. 1099 (1945), 7 F.P.C. 296 (1948) (use as boiler fuel by a power company); East Tennessee Natural Gas Co., 8 F.P.C. 836 (1949), *aff'd sub nom.*, National Coal Ass'n. v. FPC, 191 F.2d 462 (D.C. Cir. 1951) (use as boiler fuel by Atomic Energy Commission); Piedmont Natural Gas Corp., 9 F.P.C. 629, 70, 83-90 (1950) (use as boiler fuel by a power company); Texas Gas Transmission Corp., 10 F.P.C. 391 (1951) (use as boiler fuel by Tennessee Valley Authority and by a power company); Transcontinental Gas Pipe Line Corp., 11 F.P.C. 605, 615 (1952) (use as boiler fuel by a power company); Texas Gas Transmission Corp., 12 F.P.C. 658 (1953) (use as boiler fuel by a power company); Mississippi River Fuel Corp., 12 F.P.C. 109, 114 (1953) (use as boiler fuel by a power company); Panhandle Eastern Pipe Line Co., F.P.C. Opinion No. 274 (1954), *aff'd on other grounds sub nom.*, Panhandle Eastern Pipe Line Co. v. FPC, 232 F.2d 467 (3d Cir.), *cert. denied* 352 U.S. 891 (1956) (use as boiler fuel by a paper company and three others); Southern Natural Gas Co., 14 F.P.C. 243 (1955), *aff'd sub nom.*, Charleston & W. C. Ry. v. FPC, 234 F.2d 62 (D.C. Cir. 1956) (use as boiler fuel by power company serving three customers one of which devotes all power obtained to an Atomic Energy Commission project); Northern Natural Gas Co., 15 F.P.C. 682, *rev'd* 15 F.P.C. 1634 (1956), *aff'd sub nom.*, National Coal Ass'n v. FPC, 247 F.2d 86 (D.C. Cir. 1957) (use as boiler fuel by a power company); Houston Texas Gas & Oil Corp., 16 F.P.C. 118 (1956) (use as a boiler fuel by two Florida power companies); Cities Service Gas Co., 17 F.P.C. 516 (1957) (use as boiler fuel by a power company).

28 Northern Natural Gas Co., 4 F.P.C. 1099 (1945), 7 F.P.C. 296 (1948).

29 Piedmont Natural Gas Corp., 9 F.P.C. 629, 70, 83-90 (1950). See Transcontinental Gas Pipe Line Corp., 11 F.P.C. 605, 615 (1952).

30 Texas Gas Transmission Corp., 10 F.P.C. 391 (1951) (Mississippi Power & Light Co. and Tennessee Valley Authority).

[331] line was eventually granted a certificate to supply one of the two customers.[31] In the fourth case, the denial remained unchanged.[32]

All of these cases are quite distinguishable from the facts presented in the New York situation before us.[33]

We have no decided court case to give us a precedent or guidance in the matter here under discussion. Counsel for the Commission so stated and we think accurately.

In *Department of Conservation v. FPC*, 148 F.2d 746 (5th Cir.), *cert. denied* 326 U.S. 717 (1945), Memphis Natural Gas Company had been granted a certificate of public convenience and necessity. The Louisiana Department of Conservation petitioned the court for an order vacating the Commission's action, contending that the application should have been denied because the gas was to be used for boiler fuel, an "inferior" use. The court in upholding the Commission's action stated: "*Assuming, without deciding,* that the commission could properly consider as one of the facts entering into the granting or denial of the certificates the uses to which the gas was to be put, that is, that considerations of conservation had a place in such granting or refusal, we think it quite plain that the statute does not make such matters determinative."[34]

In *National Coal Ass'n v. FPC*, 191 F.2d 462 (D.C. Cir. 1951), East Tennessee Natural Gas Company had been granted a certificate of public convenience and necessity. This time it was the coal and railroad interests who asked for a vacating order on the ground that the Commission had

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31 Texas Gas Transmission Corp., 12 F.P.C. 658 (1953) (Mississippi Power & Light Co.).

32 Panhandle Eastern Pipe Line Co., F.P.C. Opinion No. 274 (1954), *aff'd on other grounds, sub nom.*, Panhandle Eastern Pipe Line Co. v. FPC, 232 F.2d 467 (3d Cir.), *cert. denied* 352 U.S. 891 (1956). Certificates were granted for service to three industrial companies and were denied for service to a fourth, a paper company. The latter had complained about fly ash trouble but the Commission concluded that the evidence therein indicated that the problem could be abated without resort to natural gas as boiler fuel.

33 We do not think that any of these cases are sufficiently significant to require detailed analysis. If the Commission has authority to regulate end use as part of a conservation plan it certainly has the authority to balance the factors in each individual case as it arises.

34 148 F.2d at 749-50 (emphasis supplied).

not considered the effect of the issuance of the certificate on competing fuels and transportation and had not considered the relation of the project to conservation of natural gas. Judge Bazelon, for Judge Fahy and himself, in upholding the action of the Commission stated: "Although considerations such as those suggested by petitioners *may well be* part of the complex out of which the Commission's judgment as to 'public convenience and necessity' arises, they are nowhere made standards governing the issuance or denial of certificates."[35]

In *Charleston & W. C. Ry. v. FPC*, 234 F.2d 62 (D.C. Cir. 1956), Southern Natural Gas Company had been granted a certificate of public convenience and necessity. The coal and railroad interests petitioned for a vacating order. Two commissioners had dissented from the order below on conservation grounds. The court in affirming the Commission's order stated: "Had the decision initially been for us we might have reached a different conclusion, on the ground of the dissent or on other grounds. But the judgment of the Commission was within its legal competence."[36]

It is apparent that none of these three cases is helpful here. Each dealt with a situation where a certificate had been granted by the Commission; the court's only concern in each was whether the Commission had failed to consider a matter of controlling significance. To say that considerations of conservation are not controlling does not aid in deciding whether or not such matters may be considered at all. In none of these cases is there any indication of a search of the legislative history to determine whether the Commission had the authority to employ such considerations in dealing with applications for certificates; obviously there was no need to make such a search. Finally, it should be mentioned that, in all three cases, the pipe line company involved was both selling and transporting the gas. That is not true here.

35 191 F.2d at 467 (emphasis supplied).
36 234 F.2d at 64.

[333] Nor does the Supreme Court decision in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), shed any more light on the matter. Although in that case, a rate-making proceeding, the State of West Virginia argued that the Commission should have considered, among other things, the effect of its rate order on conservation of West Virginia's natural gas supplies, Mr. Justice Douglas, speaking for the majority, stated: "We have searched the legislative history of the Natural Gas Act for any indication that Congress entrusted to the Commission the various considerations which West Virginia has advanced here. And our conclusion is that Congress did not."[37] On the other hand, he did go on to say that "when it comes to cases of abandonment or of extensions of facilities or service, *we may assume* that, apart from the express exemptions contained in § 7, considerations of conservation are material to the issuance of certificates of public convenience and necessity. But the Commission was not asked here for a certificate of public convenience and necessity under § 7 for any proposed construction or extension."[38] Thus this rate case has been used as authority by both sides in the present proceedings. It may be granted that the dissenting opinion of Mr. Justice Jackson goes far in stating reasons of public policy for a strong conservation program by way of husbanding our natural gas resources. But that does not put anything new into the statute.

The Commission, during the fifties, has recommended to Congress that it be given increased authority in allocation of natural gas supplies. From 1951 through 1953, the Commission requested that the Act be amended "to provide specifically for control by the Commission of the end-use of natural gas when required for national defense or to safeguard the available supply."[39] In 1954 and later years that

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37 320 U.S. at 609.

38 *Id.* at 612 (emphasis supplied).

39 31 FPC ANN. REP. 145 (1951); 32 FPC ANN. REP. 152 (1952); 33 FPC ANN. REP. 154 (1953).

[384] request was tempered somewhat to a request "to provide specifically for control by the Commission of the allocation of natural gas when required for national defense or to safeguard the available supply in emergency situations."[40] So far these recommendations have not been adopted. Whether they should be, or whether they should not be, and what the arguments are for each position has no bearing on our job in these cases. What we are sure of is that interstitial administrative action cannot be substituted for asked-for legislation if that legislation is not forthcoming.

Some of the argument made on behalf of Transco goes pretty far and it is worth taking the space to point out that we are not agreeing with it. It is said that the Commission can only go on what is in the record before it. That statement is too broad. Fact conclusions, of course, must be supported by testimony, but considerations of policy are open to commissions as well as to courts. A commission may call upon its administrative experience just as a court calls upon its judicial experience. But each, it may be added, must stay within the limits of its authority.

Let us now turn to the reasons given by the Commission for its denial of this certificate.

The first one was to the effect that if the requested certificate was granted the Commission would be confronted with many requests of the same general character; if this particular one was approved it would have no "fair or rational basis for denying similar such requests."

This reason is not open to the criticism that there were no facts to prove it. It is open to the criticism, however, that it is a denial of the discriminatory process which any judicial body must exercise. If the Commission has authority to act on a matter at all, it must, just as a court must, make its choice and pick out what it deems the most important determinative factors. Reason one, therefore, we

40 34 FPC ANN. REP. 170 (1954); 35 FPC ANN. REP. 182 (1955); 36 FPC ANN. REP. 18 (1956); 37 FPC ANN. REP. 24 (1957); 38 FPC ANN. REP. 16 (1958).

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[335] think a denial of the very thing that a Commission acting semi-judicially must do.

The second reason given is that the authorization of this and similar proposals "would pre-empt for this usage capacity which would otherwise be available to meet more urgent and widely beneficial public needs . . ." If this is not a frank expression of an assertion of authority for general conservation, we do not see how one could be expressed. We do not see any significant change in the opinion on denial of rehearing, quoted earlier. If what is said above in this opinion is correct, this reason is obviously a bad reason.

Transco makes another point in connection with this ground which we think has substance to it. The Commission talks of preemption of facilities. Transco says the Commission should have had evidence on preemption of facilities before it made such a statement. Transco argued orally to the Court that its own tax situation is such that it must keep on expanding facilities. Business-wise and tax-wise, it says, it is to its advantage to do so and for the Commission to talk about "preemption" without giving Transco a chance to demonstrate the truth of its argument is not fair administrative procedure.

Reason three is likewise an implicit assertion of the authority to conserve and allocate natural gas resources. The Commission points out that the impact of large demand on limited supply of gas is certain to raise rates even if only one bidder is bringing demand to bear on the supply. If more bidders come into the field the tendency will be increased to raise prices. In other words, the Commission wishes to discourage such bids as Con Edison made and is going to discourage them by not giving a certificate to get the gas out of the field where it has been purchased. Here again is an implicit assertion of authority to conserve and allocate supplies.

The fourth factor or policy consideration is a bit different. This points out that, while Con Edison can compete with pipe lines for gas purchases, small purchasers will not

[336] be so fortunate. And then it expresses the possibility that a pipe line may not be able or willing to continue to buy in competition with individual large purchasers. In other words, only pipe lines should purchase gas for only they engage in interstate transportation and thereby come under authority of the Commission. This puts a consideration into the statute which the Congress did not envisage. See § 1 (b) of the Act.

Ending up, the Commission says that these factors would weigh against the grant even if the "gas were to be used for a demonstrably superior use." It then says, in effect, that the purpose for which these sales would be made is something less than desirable.

There was plenty of evidence in these cases from the City of New York and Con Edison that Con Edison was confronted with a very difficult problem. There was testimony that the fly ash discharge from the boilers in question at this Waterside plant was 15,000 pounds a day and the sulfur dioxide discharge 42,000 pounds daily. There was testimony that the substitution of gas to fire these two boilers in this populous section of the City would eliminate both the sulfur dioxide and the fly ash. To us it does not seem important that elimination of the smoke from these two boilers would not solve all the air pollution problems of the City of New York. There was reliable testimony that the situation would be helped, especially in the area of the United Nations Building and Tudor City.

Of course the weighing of factors of this kind, if within the jurisdiction of a body, is a matter in which a reviewing tribunal will not interfere if a rational conclusion has been reached.

More serious, however, is the assumption which the Commission makes that the proposed use was "inferior." It is true that the gas, under the agreement, was not to be sold and it was established that it was to be used to fire boilers. But these boilers, according to the evidence, generate power for electricity and make steam for heating. We

[337] do not see that using gas to make steam to heat an apartment house is inferior to the use of gas to heat a single family residence whether by steam, hot water or whatnot. The cases the Commission had here were not those of the use of gas for industrial purposes only. There was involved also the use of gas in a step for space heating and lighting. That factor was completely ignored by the Commission so far as its opinion reveals.

The conclusion of the Court is that this order must be set aside and the cases returned to the Commission with directions to issue the certificate applied for, subject to further hearing on the minor question of rates described in footnote (2).

[338] IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12908, 12929, and 12930

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PETITIONER IN No. 12,908

THE CITY OF NEW YORK, PETITIONER IN No. 12,929

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER IN No. 12,930

v.

FEDERAL POWER COMMISSION, RESPONDENT

NATIONAL COAL ASSOCIATION, UNITED MINE WORKERS OF AMERICA, FUELS RESEARCH COUNCIL, INC., SOUTHERN CALIFORNIA GAS COMPANY, SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, INTERVENORS

Present: GOODRICH, STALEY, and HASTIE, *Circuit Judges*.

JUDGMENT NOVEMBER 3, 1959

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of January 30, 1959 of the Federal Power Commission be, and the same is hereby set aside, and the cause remanded to the Commission with directions to issue the certificate applied for, subject to further hearing on the minor question of rates described in footnote (2) of the opinion of this Court.

NOVEMBER 3, 1959.

(File endorsement omitted.)

[339] IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PETITIONER IN No. 12908

THE CITY OF NEW YORK, PETITIONER IN No. 12929

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER IN No. 12930

v.

FEDERAL POWER COMMISSION, RESPONDENT

Present: GOODRICH, STALEY and HASTIE, *Circuit Judges*.

ORDER MAKING CORRECTIONS IN OPINION NOVEMBER 20, 1959

It is ORDERED that the word "depreciation" be substituted for the word "tax" which appears in two sentences of the second paragraph on page 16 of the slip opinion, filed November 3, 1959, in the above entitled cases and that as so amended the sentences read:

> Transco argued orally to the Court that its own depreciation situation is such that it must keep on expanding facilities. Business-wise and depreciation-wise, it says, it is to its advantage to do so and for the Commission to talk about "preemption" without giving Transco a chance to demonstrate the truth of its argument is not fair administrative procedure.

By the Court.

GOODRICH, *Circuit Judge*

[340] (Clerk's Certificate to foregoing transcript omitted in printing.)

[341] SUPREME COURT OF THE UNITED STATES

No. ————, OCTOBER TERM, 1959

FEDERAL POWER COMMISSION, PETITIONER

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI JANUARY 27, 1960

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 1, 1960.

WILLIAM J. BRENNAN, JR.,
Associate Justice of the
Supreme Court of the United States.

Dated this 27th day of January 1960.

[342] SUPREME COURT OF THE UNITED STATES

No. ————, OCTOBER TERM, 1959

NATIONAL COAL ASSOCIATION, ET AL., PETITIONERS

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI JANUARY 28, 1960

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including March 1, 1960.

WILLIAM J. BRENNAN, Jr.,
Associate Justice of the
Supreme Court of the United States.

Dated this 28th day of January 1960.

[343] SUPREME COURT OF THE UNITED STATES

No. 748. October Term, 1959

Federal Power Commission, petitioner

v.

Transcontinental Gas Pipe Line Corporation, et al.

ORDER ALLOWING CERTIORARI APRIL 18, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 749 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 749, October Term, 1959

National Coal Association, et al., petitioners

v.

Transcontinental Gas Pipe Line Corporation, et al.

ORDER ALLOWING CERTIORARI, APRIL 18, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 748 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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